Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILL TINNER,

Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED

1. Whether the ultimate decision by this Court in *Miller-El v. Cockrell,* Docket No. 01-7662, will allow District Courts to consider all relevant evidence, including that submitted in formulating a *prima facie* case at step one of a *Batson* challenge, requiring remand of this case for a new trial.

2. Whether the current standard by which District Courts enforce statutory provisions enacted to protect the jury selection process from the taint of racial bias can be implemented using a "clear error" standard of review.

3. Whether the *voir dire* questions "Do any of you know anyone who has filed a suit alleging discrimination of any kind?" or "Have you or anyone you know been the victim of discrimination of any kind?" are, when directed to an African-American juror, surrogates for race.

4. Whether this Court should establish a new rule to require consistent scrutiny of peremptory strikes of minority jurors using the same test for pretext as in Title VII cases.

5. Whether this Court should grant certiorari to correct any misperceptions arising from *Purkett v. Elem*, particularly its approval of "silly or superstitious" race-neutral explanations at step two of the *Batson* inquiry.

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Will Tinner v. United Ins. Co. of America, No. EV-98-12-C-Y/H (S.D. Ind. filed June 30, 2000).

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is premised upon 28 U.S.C. § 2101(c), 28 U.S.C. § 1254(1) and Article III of the Constitution of the United States. Specifically, this Petition for Writ of Certiorari seeks review of a decision entered by the United States Seventh Circuit Court of Appeals on October 10, 2002. The Seventh Circuit Court of Appeals affirmed a civil jury trial verdict and judgment entered on January 31, 2001 in the United States District Court for the Southern District of Indiana of claims asserted under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq*. and 28 U.S.C. § 1343, *et seq*.

CONSTITUTIONAL PROVISIONS AT ISSUE

USC CONST. Amend. V

USC CONST. Amend. XIV, Sec. 1

USC CONST. Amend. XV

STATUTORY PROVISIONS AT ISSUE

28 U.S.C. § 1870

28 U.S.C. § 1862

28 U.S.C. § 1291

42 U.S.C. § 1981

42 U.S.C. § 2000e-2

42 U.S.C. § 2000e-3

STATEMENT OF THE CASE

The primary issue presented by this Petition is whether the deferential standard of review of a trial judge's ruling in a *Batson*[1] challenge adequately protects the constitutional right of an African-American litigant to a jury selected free from the taint of racial bias, and the right of a minority juror to freely participate in the judicial process. Although the factual basis of Will Tinner's argument and this Court's review is limited to the evidence developed at trial during *voir dire*, the essential question is the same as one now pending before the Court.

In *Miller-El v. Cockrell,* Docket No. 01-7662,[2] a death penalty defendant complains of the extensive pre-*Batson* practice of the Dallas County District Attorney which eliminated most minority veniremen from his jury. The

[1] *Batson v. Kentucky,* 476 U.S. 79 (1986).

[2] *Miller-El v. Cockrell,* 122 S.Ct. 1202, 152 L.Ed.2d 141, 70 USLW 3551 (2002).

evidence in support of that application is extensive, since a full *Batson* hearing took place in the trial court and much evidence of systemic intent to discriminate was amassed. Mr. Tinner doesn't have the benefit of such evidence, but the broad question presented by his Application is the same, namely, whether the current administration of peremptory strikes creates a paper right without meaningful enforcement.

As two Justices of this Court pointed out during the *Miller-El* argument,[3] simply concluding that the challenged peremptory was credible and race-neutral on its face would mean " . . . you would never have a successful Batson challenge because the prosecutor could always give a neutral reason." Mr. Tinner's Petition makes the same point. The Court of Appeals for the Seventh Circuit failed to hold the trial judge to an appropriate standard of review, either because the evidence required a contrary finding (*i.e.*, clear error), or because Federal statutory law and prior decisions of this Court mandate a higher standard, especially in a Title VII case.

A. Factual Background of Mr. Tinner's Claim for Damages

Mr. Tinner, an honors graduate of Northwestern University; a twenty-year resident of Evansville, Indiana; a salesman whose colleagues judged him uniformly to be professional, hard-working, and business-like; and an African-American male, brought this suit against his employer of six years, United Insurance Company of

[3] Transcript of Oral Argument, October 16, 2002, Docket No. 01-7662, at pages 40-42.

America, alleging job discrimination prohibited by federal law (ROA, Vol. 1, Document 1; Trans., 1/29/01, pages 163, 165, 167) 42 U.S.C. § 2000e, *et seq.*

The case he was allowed to present to a six-person jury in the Southern District of Indiana dealt with his termination from the company's employ while absent from work due to a medically-verified back condition which arose after he was offered a promotion to a management position. He followed the procedures set forth under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq.* and 28 U.S.C. § 1343, *et seq.*, by presenting his claim first to the Equal Employment Opportunity Commission. In due course, he received a letter notifying him of his right to sue, and within the time limits prescribed, filed a timely complaint for damages on January 20, 1998 (ROA, Vol. 1, Doc. 1). He alleged his employer had failed to provide him equal working conditions or an environment free from racial discrimination; had, in fact, created a hostile work environment; and brought a supplemental state cause of action for constructive discharge. He sought special damages for loss of income; general damages for emotional distress and harm to his reputation and career, and punitive damages in accordance with the law, including attorney's fees, costs, and expenses.

Through motion practice, the trial court ultimately reduced Mr. Tinner's claim to a state law count that he was constructively discharged for discriminatory reasons, and that this discharge took effect ten days prior to his scheduled departure. This claim survived a Motion for Summary Judgment on the basis of factual testimony that Mr. Tinner's supervisor displayed racial animus towards him in an overheard conversation close in time to his

discharge. The specific evidence was the affidavit testimony of Mr. Clarence James about a conversation he had overheard at a restaurant called the Sports Den in which Ms. Petts, the supervisor in question, used the racial slur "nigger" in referring to Mr. Tinner and said that he should "watch his back." (Trans., 1/20/01, pages 134-135; ROA, Vol. 2, Doc. 79).

B. Selection of the Jury

The Court impaneled an all-white jury to hear Mr. Tinner's claims of racial discrimination after the only black venire member, Mrs. Clardy, was peremptorily stricken by the defendants. Because the Court found the exercise of this strike presented a *prima facie* case sufficient to invoke a challenge under *Batson* and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), an examination of the *voir dire* process reveals the evidentiary foundation presented to the Court.

Mrs. Clardy was questioned both by the Court and by counsel. The proposed *voir dire* questions submitted by the Respondent (ROA, Vol. 3, Doc. 108) included the following:

> "No. 11. Do any of you know anyone who has filed a suit alleging discrimination of any kind?
>
> No. 12. Have you or anyone you know been the victim of discrimination of any kind?"

Mrs. Clardy was also asked general questions from the bench, in which she said that she believed an ideal juror would be competent, honest, and hear both sides of the story before making a decision (Trans., 1/29/01, page 11). Among her other answers, she said that she could be

"honest and open minded" (Trans., 1/29/01, page 51), that she could render a verdict for the defendant even if she was sympathetic to the plaintiff's plight (Trans., 1/29/01, page 55); that employers should be able to enforce reasonable workplace rules (Trans., 1/29/01, page 60); that she could be objective, even if the evidence included testimony that one of the actors used racial slurs (Trans., 1/29/01, page 63); and that a simple claim of discrimination would not cause her to rule against the defendant in this case (Trans., 1/29/01, page 65).

Unsurprisingly in view of her race, Mrs. Clardy answered in the affirmative that she knew someone who had been involved in a prior discrimination suit. It turned out to be her sister. When questioned closely about whether this prior suit in her family would affect any determination she would make as a juror, she said it was "hard to say" because she did not know all the facts. She did say her sister had "described her ordeal" to her in some detail, but that she had never heard the company's side. She said she would have no problem putting this issue behind her and deciding Mr. Tinner's case on its merits (Trans., 1/29/01, pages 55-56).

Counsel for United struck Mrs. Clardy using one of his allotted peremptories. 28 U.S.C.A. § 1870. The Court said plaintiff "absolutely" had a right to request that counsel for United voice a racially neutral reason for striking Mrs. Clardy, thus recognizing that the first prong of the *Batson* and *Edmonson* tests had been met (Trans., 1/29/01, pages 68-69). The defendant's "neutral" reason was based solely on Mrs. Clardy's response to the question concerning her knowledge of other persons who were victims of discrimination and filed suit to protect their rights. The Court found this response to be facially neutral

and allowed the challenge (Trans., 1/29/01, page 69). In reiterating its reasoning in open Court outside the presence of the jury, the Court specifically said that it believed it "may be difficult for her to remain objective" in the present case (Trans., 1/29/01, page 73), despite her testimony to the contrary.

The only other peremptory strike used by the defendants removed Mrs. Francis from the jury. Although not questioned as closely as Mrs. Clardy, Mrs. Francis' answers on *voir dire* were nonetheless illuminating. Her long-term employment was as the director of an inner-city Christian life center (Trans., 1/29/01, page 34) where she worked with disadvantaged and lower income children and adults. She said she believed racial discrimination still existed in this country; that it was wrong; and that it was contrary to God's instructions (Trans., 1/29/01, page 42).

The trial divided along racial lines insofar as the witnesses were concerned. Mr. Tinner was limited to the issue of racial animus involving Ms. Petts in the decision to terminate him ten days before his noticed date of resignation from the company. The evidence most consistent with that racial animus was the incident at the Sports Den overheard by several witnesses. Mr. Tinner testified as to his recollection of being informed of this conversation by William Taylor and Scott Wright. Mr. Taylor is an African-American, and Mr. Wright is a white man. Clarence James, an African-American whose testimony had been adduced previously by affidavit, supported this version of the overheard conversation.

Mr. Taylor and Mr. James testified that they heard Ms. Petts make the statement calling Mr. Tinner a "nigger" and that he better "watch his back." This conversation

took place less than a week before the events leading to Mr. Tinner's termination from United (Trans., 1/29/01, pages 136, 151). Ms. Petts (Trans., 1/30/01, page 384), Ms. Dixie Brumfiel (Trans., 1/30/01, page 350), and Mr. Wright (Trans., 1/30/01, page 312), all white witnesses, testified to the contrary.

The jury rendered a unanimous verdict denying Mr. Tinner's claims on January 31, 2001 (ROA, Vol. 3, Doc. 132, page 2); the jury verdict was entered on February 1, 2001 (ROA, Vol. 3, Doc. 133); judgment was signed on January 31, 2001 (ROA, Vol. 3, Doc. 134); and notice of appeal was entered on March 7, 2001 (ROA, Vol. 3, Doc. 139).

The Court of Appeals for the Seventh Circuit affirmed in a unanimous decision, finding the trial court's ruling on Mr. Tinner's *Batson* challenge did not constitute clear error. That Court also specifically rejected Mr. Tinner's suggestion that a clear and convincing burden of proof should be substituted, either constitutionally or using the supervisory authority of the Courts, in place of the current standard by which *prima facie* claims of discriminatory strikes are judged. As the Petitioner in *Miller-El* contends, that standard makes it practically impossible to exercise the constitutional rights recognized by *Batson*, and a litigant's right to enforce those rights on behalf of a minority juror as established in *Edmonson, supra,* and *Holland v. Illinois,* 493 U.S. 474. If the current standard means that all but the most creative lawyers will be deemed free from discriminatory intent, and only those foolish enough to state that intent on the record will be denied their otherwise unfettered right to use peremptory challenges, then the system by which these rights are meant to be

enforced must be clarified in a definitive ruling which can only issue from this Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ISSUE 1

THIS COURT SHOULD GRANT CERTIORARI AS PART OF ITS CONTINUING CONSTITUTIONAL, STATUTORY, AND SUPERVISORY DUTY TO GOVERN THE EXERCISE OF PEREMPTORY JURY CHALLENGES IN THE FEDERAL COURTS

The primary question before the Court in this Petition is whether it will enforce a right of equal protection granted by the Constitution and a body of law developed by this Court over the past 150 years designed to provide equal access to the instruments of justice. The particulars of this case require this Court to determine whether a black plaintiff has a right to complain about the exclusion of a female juror of his race from a panel which decided his Title VII claim of discrimination on conflicting testimony that broke down along racial lines.

Like the imaginary jury in the stage play adapted from Harper Lee's novel *"To Kill a Mockingbird,"* the Evansville, Indiana jury which decided Mr. Tinner's claims against his employer heard a case which was not "a difficult one, it requires no minute sifting of complicated fact. This case is as simple as black and white."[4] The trial

[4] *"To Kill A Mockingbird,"* Act II, Page 78.

Court's determination to accept an explanation of the discharge by peremptory strike of the only African-American juror on the panel was, in the context of this case, an abuse of discretion. That decision violated the equal protection rights of the stricken juror in a fashion prohibited by law; violated the federal statutory scheme which guarantees all persons a right free from racial discrimination to sit on a federal jury; and deprived Tinner of his "fair possibility for obtaining a representative cross-section of the community" on the jury which decided his Title VII claims. *Williams v. Florida*, 39 U.S. 78, at page 100, 90 S.Ct. 1893, at page 1906, 26 L.Ed. 446 (1970); *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), at page 825, dissent of Justice Stevens.

Mr. Tinner's invocation of his right to a jury free from the taint of racial discrimination is based on this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2007, 114 L.Ed.2d 660 (1191). It is based as well on this nation's consistent recognition of the constitutional and moral requirement of fair play, particularly when the issue turns upon a challenged process based upon invidious racial or, in some cases, economic group bias. *See, e.g., Thiel v. Southern Pacific Company*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946).

This appeal, as does the petition of *Miller-El,* calls into question the practice of U.S. District Courts in administering the statutory scheme of peremptory challenges. That administration, particularly considering many courts' embrace of the standard enunciated by this Court in *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), provides an opportunity to review the current

status of the law and to carry out the spirit of its prior rulings.

Tinner's complaint about the jury, then, presents this Court with a clear choice: either the constitutional rights recognized by *Batson* and *Edmonson* now constitute a "charade," a game in which the actors know the result and give lip service to the motive, *see, People v. Randall*, 671 N.E. 2d 60, at page 65 (Ill. App. Ct. 1996), or this Court, by enforcing the Constitution, by recognizing the statutory violations inherent in such a challenge, and by the prudent exercise of its supervisory jurisdiction, can recognize the wrong and cure it by granting Mr. Tinner's petition.

ISSUE 2

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD BY WHICH FEDERAL DISTRICT COURTS ENFORCE STATUTORY PROVISIONS ENACTED TO PROTECT THE JURY SELECTION PROCESS FROM THE TAINT OF RACIAL BIAS

The "peculiar institution" of slavery, given that designation because of its existence in a nation founded on the principle that all men are created equal, created a legacy of constitutional enactments and precedent after the War Between the States intended to balance the scales between the races in the fashion recognized by the Declaration of Independence and put in force by the Constitution. The enactment of the post-Civil War Constitutional amendments and the statutes designed to put those new rights into effect have, for 137 years, been consistently

interpreted as "rubbing off the private selfishness which is the rust of society"[5] represented by racial discrimination.

The Civil Rights Act of 1866, 42 U.S.C. § 1981, mandated that all persons have equal rights to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings. . . . " Two months after its passage, Congress sent the 14th Amendment to the states for ratification.

The 1866 Act clearly applies to the issue now before the Court. In *Strauder v. West Virginia*, 100 U.S. 303, 10 Otto 303, 25 L.Ed. 664 (1880), the Supreme Court ended a prevalent practice in that state of excluding black citizens from jury service on the grounds that such actions were violative of both the 14th Amendment and Section 3 of the 1866 Act. Before *Strauder* reached the Court, Congress passed 28 U.S.C. 1862[6] which provides, in pertinent part:

> " . . . [N]o citizen possessing all other qualifications . . . shall be disqualified for service as a grand or petit juror in any Court in the United States . . . on account of race. . . . "

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[5] *Edmonson v. Leesville Concrete Company, Inc.*, 860 F.2d 1308 (Panel Opinion 5th Circuit 1988) at pages 1312-1313.

[6] Previously 18 Stat. 336-337, formerly 8 U.S.C. § 44.

The Standard by which Appellee's Race Neutral Challenge Should Be Judged Establishes Bias Against the Challenged Juror Which Can Be Raised by Mr. Tinner in this Appeal.

By 1990, this Court recognized that although the primary focus of a discriminatory jury strike involved the litigant's life or liberty interests in obtaining a "fair possibility" of an impartial jury, it also recognized other injured parties, including the excluded juror. Justice Kennedy referred to that injury as "the established rule . . . " in *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990). He went on to say:

> "To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that racial exclusion of citizens from the duty and honor of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civil life that the 14th Amendment guarantees."

Since 1970, citizens excluded from participation in the jury process on account of their race have had a private right of action for that violation. *Carter v. Jury Commission of Green County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 549 (1970). Even before *Batson*, the machinery of discrimination was attacked whenever it allowed "those to discriminate who are of a mind to discriminate." *Avery v. State of Georgia*, 354 U.S. 559, 73 S.Ct. 891, 91 L.Ed. 1244 (1953); *see also, Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965).

While the Constitution protects against all forms of discrimination and the *Batson* rule has been extended to other injured groups,[7] constitutional theory has always applied a particularly close scrutiny to decisions based on race. In Mr. Tinner's case, the exclusion of a black person from the jury which would decide his civil rights claim is particularly telling:

> "For us the majestic generalities of the 14th Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. . . . A Negro who confronts a jury on which no Negro is allowed to sit . . . might very well say that a community which purposely discriminates against all Negroes discriminates against him." *Fay v. New York*, 332 U.S. 261, at pages 282-3; 67 S.Ct. 1613, at page 1625; 1 L.Ed. 2043 (1947).

The exclusion of Mrs. Clardy is the type of peremptory challenge which should be particularly suspect. A review of the transcript of the *Batson* challenge to her exclusion has that set-piece quality which shows the actors expected the result, a process the Seventh Circuit has referred to as "the Batson jig."[8] Such denigration of a procedure designed to enforce what the Supreme Court has classified as a Constitutional right of equal protection is in itself a comment on the gap between the creation of the right and

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[7] *See J.E.B. v. Alabama*, 511 U.S. 127 (1994).

[8] *Alverio v. Sam's Wholesale Club, Inc.*, 253 F.3d 933 (7th Cir. 2001).

the implementation of the legal protection the Courts are obligated to provide.

The question by which Mrs. Clardy was excused is itself a surrogate for race, much in the fashion that the interest in an Hispanic juror's language skills was at issue in *Hernandez v. New York*, 500 U.S. 352 (1991). It is beyond argument that a *voir dire* question directed to a potential juror asking whether she "knows" or is "related to" anyone who has ever filed a discrimination claim is more likely to elicit a positive response from a black venireman than others. Could the Court sanction a *voir dire* question which asked, "Do you have any ancestors who were slaves?" Indeed, could it sanction a *voir dire* question that asks, "Are you a Negro?" Those questions would be designed to obtain only racial responses, and if positive answers were used by the questioner to exclude the juror, such a challenge would *ipso facto* be motivated by race. It is suggested that the questions at issue here are no different.

As Professor Cavise of DePaul College of Law noted in a recent law review article:

> " . . . [T]he problem that *Batson* was supposed to address was the use of negative stereotypical and biased notions of race to exclude in a wholesale manner any minority. The dishonor in a particular race-based peremptory strike is not that it may validly comment on a difference that may result from race. That touches the fairness of the juror and should be the subject of further *voir dire*. The dishonor is that pure racist and sexist

> motivation keeps minorities and women off juries regardless of whether race would in any way be a factor in the deliberations."[9]

The studies cited in Professor Cavise's article, at note 74, showed that through the end of 1993, neutral explanations were rejected 17.8% of the time and that the largest percentage of those rejected were because of pretext. Of the almost 3,000 peremptory challenges included in a survey cited by the article, only 57 were rejected as "unpersuasive." The trial court's decision in *Miller-El* to accept as neutral all challenges of the prosecutor, which eliminated all but one (91 percent) of the available African-American jurors from his panel, is further proof of the ease with which peremptory strikes are justified by creative lawyering.

With the identified evil having been exposed, the Court must now grapple with the proper standard to be applied in examining Mr. Tinner's challenge and Mrs. Clardy's inchoate claim.

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[9] The *Batson* Doctrine: *The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wisconsin Law Review 501.

ISSUE 3

THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE CONSISTENT SCRUTINY OF PEREMPTORY STRIKES OF MINORITY JURORS USING THE SAME TEST FOR PRETEXT AS IN TITLE VII CASES.

Mrs. Clardy possessed a *Green County*[10] right to challenge her exclusion from this jury against the state actor who struck her, counsel for the defendant. *Edmonson, supra*. This right existed because, as Judge Young recognized at the time of the exercise of the peremptory strike, a *prima facie* case existed satisfying the first two prongs of the *Batson* analysis (Trans., 1/29/01, page 56). This is a critical distinction from the exclusion of the juror in *Purkett, supra*, in which this Court found that the "silly or superstitious" justification given by the hypothetical prosecutor was acceptable to advance the inquiry to the third stage, and that the Court could essentially ignore the evidence which supported a *prima facie* case in the first place. This has led, in practice, to a denegration of the process which makes it practically impossible to sustain a claim of pretext against a lawyer using a peremptory challenge which is supported by even a scintilla of evidence it was "facially neutral."

In adopting the *Purkett* rule in *Alverio*, and now in the case presented by this Petition, the Seventh Circuit created a generalization which is not supported by the Constitution that created the right nor by the cases which interpret it.

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[10] *Carter v. Jury Commission of Green County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 549 (1970).

When United's counsel challenged Mrs. Clardy as a juror, his sole voiced complaint was her single assertion that her sister's discrimination claim was "an ordeal" and that she could not make a fair analysis of that preexisting claim because she "didn't really know all the information (Trans., 1/29/01, Page 57)." Balanced against the rest of her testimony in *voir dire*, which clearly established her objectivity in the case at hand, proper scrutiny of this challenge using standards consistent with civil rights litigation would have found the "racially neutral" explanation to be pretextual. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

In Title VII employment cases, "pretext" means "a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Company,* 51 F.3d 64 (7th Cir. 1995). A pretextual explanation is one which is "unworthy of credence." *Robinson v. PPG Industries, Inc.*, 23 F.3d 1159 (7th Cir. 1994). The analysis is more than an evaluation of the correctness or desirability of the reason proffered for the alleged discriminatory action. This issue addresses whether the person employing the standards asserted to be pretextual "honestly believes" the offered reasons. *Kralman v. Illinois Dept. of Veteran's Affairs*, 23 F.3d 150 (7th Cir. 1994).

The *voir dire* process and the challenges used by counsel for United must be examined together, and should have been by the trial judge, in evaluating Mrs. Clardy's testimony and United's assertion of neutral intent. After all, the Supreme Court's reason for establishing a factual standard of review of so-called pretextual challenges is based on a trial judge's superior ability to interpret nuance, facial expressions, and other objective analyses

foreign to the Court of Appeals. *Hernandez, supra.* But this Court can read the record, and the record shows that the only other peremptory challenge employed by United struck a juror whose answers indicated she would be sympathetic and receptive to Mr. Tinner's claims of discrimination.

Nothing in this regard should be interpreted to be an ethical or bad faith accusation against counsel for United. After all, he was following a procedure not only set out by this Court but seemingly endorsed in *Purkett*. But *Purkett* did not announce a reversal of any portion of the *Batson* case. It did not mention *Edmonson v. Leesville Concrete Company*, the first civil case recognizing the state action element of such a peremptory strike. And the Court never addressed the other statutory issues inherent in the jury selection process.

ISSUE 4

THIS COURT SHOULD GRANT CERTIORARI IN A PRUDENT EXERCISE OF ITS SUPERVISORY AUTHORITY TO CORRECT ANY MISPERCEPTIONS ARISING FROM *PURKETT*'S ACCEPTANCE OF "SILLY OR SUPERTITIOUS" RACE-NEUTRAL EXPLANATIONS AT STEP TWO OF THE *BATSON* INQUIRY

This Court's decision in *Purkett*[11] has been widely regarded by the Circuit Courts as effectively extinguishing the right of a litigant making a *Batson* challenge to the expectation of a non-pretextual reason for the particular

[11] *Supra*, at page 10.

discrimination which, by that stage of the proceedings, exists by *prima facie* evidence. In *Alverio*, the Seventh Circuit characterized the second step of the process – when the striking counsel provides reasons and justification – as of minimal interest to an appellate Court, pointing out *Purkett's* reaffirmation of the clear error rule of review, even when a district judge's decision to accept a prosecutor's "lame explanations" as neutral is questioned on appeal. *United States v. Roberts*, 163 F.3d 998 (7th Cir. 1998).

If *Purkett* did nothing else, it placed extreme reliance on a trial Court's ability to apply the third step in the process of a *Batson* challenge, an evaluation of the credibility of the race neutral explanation, in a gatekeeping fashion which would prevent "implausible or fantastic justifications" from being given effect.

But the message *Purkett* delivered was quite different. Its phraseology[12] formed a significant overlay to a process which already was tilted against the acceptance of the primary proposition that peremptories permit "those to discriminate who are of a mind to discriminate,"[13] and replaced it with the "charade" referred to by Professor Cavise. Or, perhaps, by referring to this gatekeeping function as "the third step of the *Batson* jig . . . " as the Seventh Circuit did in *Alverio*.[14]

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[12] "Even silly or superstitious reasons . . . must be accepted."

[13] *Avery v. State of Georgia*, *supra*, at page 13.

[14] At page 941.

A right of citizernship which arose over the course of 137 years of litigation, permeated by the constitutional theory which has guided this country since its inception and quoted in lofty language by multiple decisions of this Court, cannot have degenerated to the point where all parties, including the Court, realize that it is a paper right without substance. If we have truly reached a point where clever advocacy can provide a justification for counsel to reach the same result he planned to accomplish before he ever met any of the members of the venire, then the system is broken.

When *Edmonson* was first decided, no right of complaint existed in the civil Courts on behalf of either the litigants or the jurors who were parties to a blatantly discriminatory act. While United's trial counsel did Mrs. Clardy the courtesy of questioning her before he struck her from the panel, this was not the case in *Edmonson*, where the two black jurors were challenged without any reference appearing in the record beyond their name, age, and race. In its own way, the "trial jig" danced by the participants in that case correlates to the "charade" which now seems to be the accepted norm.

But the late Judge Alvin Rubin, a distinguished jurist first appointed to the bench by President Johnson and joined in his opinion by the late Judge John Minor Wisdom, saw a wrong which had to be redressed:

> "Responsible for impaneling the jury, the Court, and hence, 'the state, is not merely an observer of the discrimination, but a significant participant. . . . The only thing the state does not do is make the decision to discriminate. Everything else is done or supplied by the state,' a New York State judge observed. By presiding over jury

> selection in his official, governmental capacity, a judge is intimately involved in the process . . . by carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval.
>
> "Justice would indeed be blind if it failed to recognize that the federal Court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled Courtroom, in front of an American flag, says to a juror, 'Ms. X, you are excused.' A litigant's decision to provoke the Court's action by virtue of a statutorily accorded right does not disguise the official governmental character of the procedure as a whole."

Edmonson v. Leesville Concrete Co., Inc. (Panel Opinion), 860 F.2d 1308 (5th Cir. 1988)

In the case before the Court, enough facts are known to show that a different standard would have led to a different result. The tone and tenor of this Court's prior decisions sent the inevitable signal to Judge Young that knowledge of a prior discrimination case and the characterization of it as an "ordeal" presented a neutral reason for the striking of an African-American female juror. If that is so, then no civil rights defendant represented by any counsel as skillful as United's lawyer below will ever be a broad cross section of the community, because it will never include an African-American among its number. The *Alverio* case, in which a woman complained of sexual

harassment on the job, presented similar issues which were recognized by the Court. There, counsel for the defendant struck potential woman jurors because of their lack of work experience. The Court found that the modern world in which women participate in the work place on a more or less equal footing with men did not mean that a lack of work experience was a proxy for being a "male juror." Significantly, though, in dancing the *Batson* jig, the Court of Appeals found it didn't matter:

> "Even were this true, and Mr. Holloway's stated reason had a disparate impact on female jurors, this would still be irrelevant. . . . The question here is whether Mr. Holloway had a gender-neutral reason for striking these jurors. According to Judge Cleland, he did, and we give great deference to the judge's determination of discriminatory intent. . . . Even were we to find [the judge's] decision to be dubious, we would still not reverse unless we were left with a 'definite and firm conviction that a mistake had been made.'"

Alverio, at pages 941-942.

Clear Error Review of Race Neutral Reasons Does Not Adequately Enforce the Constitutional Rights Implicated in *Batson*, and Should Be Replaced by *De Novo* Review, or a Trial Burden of Clear and Convincing Proof.

The supervisory authority this Court is mandated to exercise is broad and is applied routinely in exactly the same situation presented here. This Court has the authority to establish a new rule of review of *Batson* challenges, and Petitioner suggests a *de novo* review is appropriate for the same reasons the Court reviews summary judgment

presentations *de novo*. In those rare instances where an appeals Court cannot determine the trial judge's reasons for accepting or declining a race neutral reason – for example, when the judge's observation of trial counsel's demeanor or his prior acquaintance with him provides a basis for belief and does not appear of record – remand for further evidence would be appropriate. Otherwise, the establishment of a new burden on the party exercising peremptories in a way which invokes the first prong of the *Batson* test would guard against the process degenerating into a meaningless exercise.

Judge Young at the district court in Evansville clearly believed he was without authority to dismiss the explanation of United's counsel for striking Mrs. Clardy as long as it was "facially valid." He believed he could not otherwise intervene in the process. This perception is clearly wrong, and if so, this Court best performs its judicial function by correcting the misperception and either establishing a new standard for review, a new standard for acceptance of voiced racially neutral reasons which approximates the standard used to determine pretext in the civil rights case, or a combination of the two.

One example of the non-constitutional basis for such an exercise is contained in *Thiel v. Southern Pacific Company*.[15] In *Thiel*, "working men" were excluded from a jury based on their status. From the record reproduced in the Supreme Court's opinion, it appears that none of the jurors was questioned about his availability for trial or any potential bias. The Supreme Court reversed on

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[15] *Supra*, at page 10.

supervisory grounds to correct the inequity of the result which occurred. However, the Court did not at that time resort to any analysis of due process or any requirement of state action in the procedure employed. Rather, recognizing both the inequity which existed as to the specific litigant and the damage which would be wrought on the jury system were the judge's decision allowed to stand, the Supreme Court invoked its supervisory authority, identified the evil, and corrected it by reversing the judgment. *See also, McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 879 (1943). The same issue was squarely addressed by the Fifth Circuit in an *en banc* case decided while *Batson* was under consideration by the Supreme Court. The dissenter in that case characterized the supervisory power of the Courts as follows:

> "The role and the scope of the supervisory power are delineated by establishing four basic propositions. . . . First, this Court possesses broad supervisory powers over lower Courts. Second, there is no doubt that the supervisory powers of federal Courts may be used to correct injustices which do not amount to constitutional or statutory violations. Third, the supervisory power – encompassing broadly several forms of deterrence of prosecutorial misconduct – is appropriate on the facts of the present case. Fourth, although Congress undoubtedly has the right to override supervisory power rulings through legislation, Congress has not spoken with respect to the narrow holding of the panel [which reversed the conviction based on racially-motivated strikes]."

United States v. Leslie, 783 F.2d 541 (5th Cir. *en banc* 1986) (Williams, J. dissenting), *vacated*, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987).

Mr. Tinner takes as a given the Court's interest in insuring the juries that try his and similar cases are composed of panel members selected for characteristics other than skin color. It cannot be gainsaid that a Court's description of a serious constitutional right as akin to a "charade" or a dance with a predetermined outcome does nothing to deter counsel who are "of a mind to discriminate." The creation of a different standard of review would do much to deter such action.

Indeed, that is exactly what the Seventh Circuit originally did in *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281 (7th Cir.), *cert. denied*, 501 U.S. 1205, 111 S.Ct. 2797, 115 L.Ed.2d 970 (1990) when it became the first among the Circuit Courts to recognize the right of a litigant to complain about the exclusion of a minority juror. On appeal after remand, the Court in *Dunham* upheld the Magistrate Judge's finding that the challenge to the excluded juror – made on the basis that she was a hairdresser – was race neutral and did not reveal purposeful discrimination. Using language similar to the pretext cases cited *supra*, the Court of Appeals continued to recognize, however, that " . . . a race-neutral explanation which is 'an obvious mask for a race-based challenge' does not suffice to rebut a *prima facie* case of discrimination." *Dunham*, 967 F.2d 1121 (7th Cir. 1992), at page 1124. *See also, Splunge v. Clark*, 960 F.2d 705, at page 709 (7th Cir. 1992).

CONCLUSION

Whether by utilizing the test of pretext or applying a proper standard of review to the reasons given Judge

Young by United's trial counsel, it is obvious that the voiced reasons for Mrs. Clardy's exclusion had *everything* to do with race. There is absolutely no doubt that the question "Do you know anyone who has filed a discrimination claim?" is no different in principle from asking "Are you black?" Any response to such a question cannot form the basis of a race-neutral explanation, because it is motivated *entirely* by race. As Judge Rubin so eloquently put it:

> "Edmonson's invocation of his constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. We must take another step toward the goal of eradicating racial prejudice by eliminating the shameful practice of permitting a federal statute to be employed in a trial in a federal Courtroom as a weapon of discrimination. I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of skin rejects the promise upon which this nation's independence was based and the guarantee that the 14th Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury."

Edmonson, en banc opinion, cited *supra* at page 5, dissent of Judge Rubin, at pages 237-238.

The duty of a federal Court in enforcing such rights cannot be passed off as a "charade" or a "jig." It is serious business, and has suffered in its implementation by Courts not willing to recognize this is so. When Will

Tinner faced a jury upon which no African-American was allowed to sit, he was justified in believing that the system which discriminated against all African-Americans discriminated against him. It is up to this Court, either through exercise of its supervisory power or a recognition that a more stringent review is called for, to correct this perception.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 01-1579

WILL TINNER,

Plaintiff-Appellant,

v.

UNITED INSURANCE COMPANY
OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 98 C 12 – Richard L. Young, *Judge.*

ARGUED SEPTEMBER 18, 2002 –
DECIDED OCTOBER 10, 2002

Before BAUER, MANION, and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* Plaintiff Will Tinner ("Tinner") brought an action under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.*, against his employer, United Insurance Company of America ("United"), for race discrimination, a racially hostile working environment, retaliation, wrongful termination, and state and federal counts of constructive discharge. The district court dismissed several of Tinner's claims on summary judgment and a trial proceeded on Tinner's claim for unlawful termination. A jury returned a verdict in favor of United and judgment was entered on the verdict. Tinner first appeals the district court's denial of his *Batson* challenge, which arose out of United's peremptory strike of the only

African-American member of the venire panel. Tinner also appeals the district court's grant of partial summary judgment on several of his discrimination claims because they were time-barred and not subject to a continuing violation theory. We affirm on both counts.

BACKGROUND

A. Tinner's Employment History with United

United employed Tinner as a Sales Representative at its Evansville, Indiana office from March 19, 1990, through June 10, 1996. United is a home service insurance company whose coverage is generally provided to low-income families. As a Sales Representative, Tinner went door-to-door to service his customers and solicit new business within his assigned geographical area, known as a "debit route." Tinner's compensation came primarily from commissions, and his income fluctuated from month to month based on his level of sales and/or charge backs to his commission as a result of unpaid premiums. During his six years of employment with United, Tinner developed a very successful book of business and twice received the salesman of the year award.

According to Tinner, shortly after beginning his employment, United transferred his debit route from a middle class area of Evansville to the predominately African-American area of the city. Tinner, who is African-American, was told by his superiors that they believed he would be more successful in this area. Tinner, by his own admission, excelled in his new debit route and "did better than anyone else ever has or probably ever will." Tinner believed, however, that United's decision to transfer his debit route in 1990 was discriminatory.

Three years later, in the spring of 1993, an incident occurred between Tinner and Jane Merchant ("Merchant"), a white, female office administrator for United. Apparently, Tinner asked Merchant to complete some paperwork for him, but Merchant took offense at the way in which Tinner carried himself when making the request. Merchant complained to management and Tinner voluntarily apologized to her. The District Manager also admonished Tinner to be careful with the way he treated Merchant in the future. Tinner believed that United discriminated against him in this instance.

In the winter of 1994, following a heavy snowstorm in Evansville, Tinner arrived at work wearing blue jeans, sneakers, and a shirt. United's dress code at the time required Sales Representatives to wear a tie and dress slacks. Tinner's manager told him to return home and change his clothing before attending a sales meeting in the office later that day. The following day, the District Manager presented Tinner with a written warning that Tinner refused to sign. The Regional Manager for United subsequently told Tinner that he would not have to sign the warning. Tinner claims that other employees frequently wore such attire but that management singled him out in discriminatory fashion.

Nothing further occurred until May 1996 when Tinner's District Manager, Angie Petts ("Petts"), asked him to apply for a new Staff Manager position in the Evansville office. After interviewing with the Regional Vice-President, Tinner received a job offer at a salary ten dollars per week higher than his then-average weekly salary. The offer was also fifty dollars per week higher than the then standard Staff Manager salary. The Regional Vice-President offered Tinner the higher salary

because he felt that Tinner's past experience and performance justified the increase. Tinner, however, believed that the offer had the potential to reduce his income by over $400 per month because it was less than his actual salary at that time. Accordingly, he rejected the promotion offer and remained a Sales Representative.[1] Tinner believed that United's actions were also discriminatory at the time.

Finally, shortly after rejecting the promotion offer, Tinner requested vacation time from June 10, 1996, through June 14, 1996. Petts denied his request because he had taken a week off in mid-April and because he was not meeting the expected sales increase for his debit route. On June 3, 1996, Tinner called in sick with back pain, for which he sought some form of medical treatment.[2] Petts unsuccessfully attempted to reach Tinner at home on the following two days. United introduced evidence at trial establishing that Tinner sought other employment during

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[1] Neither party adequately explained exactly how Tinner's compensation as a Staff Manager would have been calculated, nor did they explain how his compensation could decrease at a management level position. Tinner argues that because his compensation would have been lower as a Staff Manager, despite the fact that United offered him a higher starting salary than normal, United again treated him in discriminatory fashion.

Subsequent to Tinner's rejection of the offer, United offered the job to Dave Brown, a younger, white male who had been with the company fewer years than Tinner. Brown accepted the job at United's standard salary.

[2] In his brief, Tinner argues that witnesses corroborate that he followed company policy by informing Robin Cochran, an office administrator, of his medical absence when he could not reach Petts or any other supervisor over the phone on the morning of June 3. United, however, claims that Tinner failed to follow company policy by not directly informing a district or staff manager.

this time. In fact, on May 30, 1996, Tinner filled out a job application with American General Financial Group. On June 6, Petts spoke with Tinner and informed him that he was to report to work on June 10 or present a doctor's note as to why he could not work. Petts also sent a letter to Tinner's home reiterating the conversation of June 6.

On June 10, 1996, Tinner arrived at United's office and gave an office administrator a letter addressed to Petts containing his two-week resignation notice effective June 21, 1996, as well as a note signed by his doctor stating that he could return to work on June 10. Tinner, however, did not work that day for United, though he did sign an employment contract with American General on June 10, 1996. On June 11, 1996, Tinner received notice that United terminated his employment as of June 10, 1996, because of his failure to return to work that day.

B. Tinner's Claims and the Procedural History

Following his termination, Tinner filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on September 3, 1996. The EEOC issued Tinner a right-to-sue letter, and he timely filed the instant case on January 20, 1998. Tinner raised claims for race discrimination, a racially hostile working environment, retaliation, wrongful termination, and state and federal counts of constructive discharge.

United filed a motion for summary judgment arguing that the debit route transfer in 1990, the incident with Merchant in 1993, and the dress code violation in 1994 were time-barred because Tinner had failed to file a charge with the EEOC within 300 days of those events.

They also argued that the 1996 termination was devoid of discriminatory intent.

Tinner responded that the actions, when taken as a whole under a continuing violation theory, demonstrated a hostile work environment and racial harassment. The district court granted partial summary judgment in favor of United on the three alleged discriminatory acts in 1990, 1993, and 1994 because they were time-barred. It further granted summary judgment to United on Tinner's claims that the promotion offer at lower pay and the denial of vacation in May 1996 were discriminatory. Finally, the court granted summary judgment for United on Tinner's federal constructive discharge, hostile working environment, and retaliation claims.

The court's order left Tinner with only his state constructive discharge claim, for which the court instructed him to file a more definite statement. Tinner complied with that order in December 1999. In March 2000, however, Tinner filed a motion asking the court to reconsider the previous ruling regarding his unlawful termination, claiming new evidence created a genuine issue of material fact as to Petts' racial animus towards Tinner. Specifically, Tinner pointed to affidavit testimony by Clarence James ("James"), a United employee, about a conversation James overheard prior to Tinner's termination in which Petts referred to Tinner as a "nigger" and said that Tinner should "watch his back." The court reinstated the claim.

The case proceeded to trial in January 2001 on Tinner's claim of wrongful termination, which he said occurred prior to the effective date of his resignation. On

January 31, 2001, the jury returned a verdict in United's favor and judgment was entered on the verdict.

C. Jury Selection at Trial

Tinner's appeal centers first around the selection of the jury and United's use of a peremptory challenge to eliminate the only African-American member of the venire panel. During *voir dire* of the panel, counsel for United asked each potential juror the following questions: "Do any of you know anyone who's filed a suit alleging discrimination of any kind? If you do, any of you know – anybody know of or heard of anybody who's filed a suit alleging discrimination?" In response to these questions, two potential jurors answered affirmatively.

The first was Mr. Kuester, a white male, whose company had charges of racial discrimination filed against it. Upon questioning from Tinner's counsel, Mr. Kuester stated that the claims against his company would not prevent him from listening fairly to Tinner's case. Mr. Kuester also stated that he was aware discrimination occurs, that sometimes he felt it was alleged when not true, but that when it does occur it is not right.[3] Tinner's

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[3] In response to *voir dire* from Tinner's counsel, Mr. Kuester said:

> I think I could be fair. You should probably know that my corporation has – I have not been personally involved in any lawsuits, but we have been accused of racial discrimination, and it was never – it was never – one case, there was a complaint filed with the EEOC, and they came back with a ruling there was no indication of discrimination.

When asked by Tinner's counsel whether those charges would prohibit him from listening fairly to Tinner's case, Mr. Kuester replied,

(Continued on following page)

counsel, nevertheless, exercised a peremptory challenge to exclude Mr. Kuester from the jury. United did not object to Mr. Kuester's exclusion.

The second venire member who responded affirmatively to counsel for United's questions was Mrs. Clardy, an African-American female whose sister filed a discrimination claim against her employer. Mrs. Clardy stated that she did not know whether her sister's experience would affect her (Mrs. Clardy's) determination in Tinner's case because she did not know all of the facts of her sister's "ordeal."[4] In response to questions from the court, Mrs. Clardy felt she could be "honest and open- minded" and that she could be objective even if the evidence included testimony that racial slurs were directed at Tinner. United's counsel, however, exercised a peremptory challenge and struck Mrs. Clardy from the jury panel.

Counsel for Tinner then invoked a *Batson* challenge and requested that United give a race-neutral reason for striking Mrs. Clardy, the only African- American member of the venire. Counsel for United responded that he struck Mrs. Clardy because her sister previously filed a discrimination

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"I don't think so." He went on to state, with respect to race discrimination:

> I know it goes on. There are – I think there are cases where discrimination is claimed where there possibly was none, but there's certainly racial discrimination that's ongoing in our country. It's not right.

[4] Mrs. Clardy stated:

> It's hard to say because I didn't go through the courts with her. Basically, I know what happened or what she told me was her ordeal, but as far as the company she was working with, you know, I don't know.

claim against her employer and because Mrs. Clardy described her sister's experience as an "ordeal." The court accepted United's response as race-neutral, finding that Mrs. Clardy might have a difficult time remaining objective. The resulting jury contained no minority members.

ANALYSIS

A. *United's Peremptory Challenge of Mrs. Clardy*

This Court employs a clearly erroneous standard when reviewing the district court's factual findings under a *Batson* challenge. *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 940 (7th Cir. 2001) (extending same standard to peremptory challenges on the basis of gender); *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000) (applying clearly erroneous standard to race challenge). The determination to accept a race-neutral reason often turns on the credibility of the attorney exercising the peremptory challenge. The trial judge is clearly in the best position to make that factual determination. Accordingly, "there is no basis for reversal on appeal unless the reason given is completely outlandish or there is other evidence which demonstrates its falsity." *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998), *modified by*, 136 F.3d 1115 (7th Cir. 1998).

Under the test established by the Supreme Court in *Batson v. Kentucky*, the Equal Protection Clause prohibits the use of a peremptory challenge to strike a potential juror from the venire panel solely because of the person's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also Hernandez v. New York*, 500 U.S. 352, 358 (1991); *Jordan*, 223 F.3d at 686. The Court subsequently extended the same rule to civil proceedings. *Alverio*, 253 F.3d at 939

(citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991)). Under *Batson*, three well-defined steps determine the validity of a challenged peremptory strike: 1) the party objecting to the peremptory strike must first make a prima facie showing that the strike was made on the basis of race; 2) the burden then shifts to the party exercising the peremptory challenge to offer a race-neutral reason for the strike; and finally 3) the trial court must decide whether the proffered reason is pretextual and whether the party opposing the strike has proven purposeful discrimination. *Hernandez*, 500 U.S. at 358-59; *Jordan*, 223 F.3d at 686.

The parties here do not contest that Tinner made a prima facie showing when United's counsel exercised a peremptory challenge to strike Mrs. Clardy. United then offered two reasons for striking Mrs. Clardy, specifically that her sister filed a discrimination claim against her employer and that Mrs. Clardy described her sister's situation as an "ordeal."

Tinner contends that United's questions were surrogates for race, thereby establishing purposeful discrimination. Although United asked every member of the venire panel whether they knew or heard of anyone who filed a discrimination claim, Tinner argues that when posed to the only African- American venire member the questioning amounted to asking her "Are you black?" or "Were any of your ancestors slaves?" The district judge, however, accepted United's reasons as race-neutral and found that Tinner failed to prove purposeful discrimination. Thus, the only issues on appeal are whether the trial judge committed clear error in finding: 1) that United's proffered reasons for striking Mrs. Clardy were race-neutral; and 2)

that Tinner ultimately failed to demonstrate purposeful discrimination.

1. Whether United's reasons were race-neutral

We deal first with whether United's proffered reasons were race-neutral. At issue is the facial validity of the reasons offered. "A neutral explanation . . . means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the [party's] explanation, the reason offered will be deemed race-neutral." *Hernandez,* 500 U.S. at 360. The persuasiveness of United's reasons is not relevant at this stage of the inquiry. *Purkett v. Elem,* 514 U.S. 765, 767 (1995) (per curiam); *see also United States v. Evans,* 192 F.3d 698, 701 (7th Cir. 1999) (stating that "[u]nlike a challenge for cause, a peremptory strike need not be persuasive or even plausible so long as it is race-neutral"). Clearly, the party wishing to use a peremptory strike need not defend the strike as though it were a challenge for cause. *Morse v. Hanks,* 172 F.3d 983, 985 (7th Cir. 1999). What matters, simply, is whether United offered a reason or reasons for excluding Mrs. Clardy that are not facially related to her race. If United did, then the district court did not commit clear error in accepting those reasons as race-neutral.

United's first reason for striking Mrs. Clardy related to her sister's filing of a discrimination lawsuit. On its face, this reason has nothing to do with Mrs. Clardy's race. In addition, this Court previously upheld as race-neutral reasons relating to a venire member's involvement in or relationship to litigation or potential litigation. *See Alverio,* 253 F.3d at 940 (holding that exclusion of juror was not racially motivated because, in part, "she was the only

prospective juror who had been a plaintiff in a lawsuit"); *see also United States v. Briscoe,* 896 F.2d 1476, 1488-89 (7th Cir. 1990) (upholding peremptory challenges of two jurors involved in criminal prosecutions and challenge of juror who had been a victim of crime and was bitter that no one was ever charged for the crime). While Mrs. Clardy was neither the plaintiff nor the victim of discrimination in her sister's lawsuit, her relationship to and knowledge of the facts and circumstances of the case cannot be discounted. Mrs. Clardy stated in *voir dire* that she "did not go through the courts" with her sister. Being present throughout the litigation, however, would not be necessary to taint her view of discrimination litigation.

This line of reasoning is further supported by United's second reason for striking Mrs. Clardy, because she categorized her sister's experience as an "ordeal." Again, United's second reason is facially neutral. The term "ordeal" clearly carries a negative connotation[5] and suggests that Mrs. Clardy, quite naturally, felt sympathetic towards her sister's situation. No one would fault Mrs. Clardy for expressing such sympathy towards a family member, but it is precisely such sympathy that United sought to exclude from the jury. There is nothing facially invalid in United's desire to exclude someone whose close relative went through the "ordeal" of a discrimination lawsuit. The district court did not commit clear error in finding that United's proffered reasons were race-neutral.

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[5] An ordeal is "a difficult or painful experience, esp. one that severely tests character or endurance." THE AMERICAN HERITAGE DICTIONARY 874 (2d coll. ed. 1991).

2. *Whether Tinner demonstrated purposeful discrimination*

Because United offered two race-neutral reasons for exercising its peremptory challenge of Mrs. Clardy, the final step of the *Batson* test required the trial court to determine whether Tinner met his burden of showing purposeful discrimination. *Batson,* 476 U.S. at 89. Again, the trial court's determination on this issue is a factual one and can only be reversed by this Court on a finding of clear error. *Evans,* 192 F.3d at 700. To prevail at this stage of the inquiry, Tinner must demonstrate that, despite United's race-neutral justification for its peremptory challenge, United's actions showed discriminatory purpose.

Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Hernandez,* 500 U.S. at 360. To be sure, disparate impact upon a particular group is not sufficient to establish discriminatory intent on United's part. *Id.* (stating that "[a] court addressing this issue must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause' "). At this stage, the district court can consider the persuasiveness of United's reasons for striking Mrs. Clardy, and "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett,* 514 U.S. at 768.

In *Alverio v. Sam's Warehouse Club, Inc.*, this Court upheld the peremptory strikes of all three women on the venire panel, in part, because defense counsel felt the women lacked business experience and knowledge. *Alverio,* 253 F.3d at 940. The *Alverio* Court specifically doubted that "having business experience" amounted to a proxy for "male juror" because women today cannot be said to have less work experience than their male counterparts. *Id.* In *United States v. Stafford,* this Court also upheld a peremptory challenge of an African-American female because the prosecution believed that her strong religious background and involvement would make it difficult for her " 'to sit in judgment on a fellow human being.' " *Stafford,* 136 F.3d at 1113-14. In providing its race-neutral explanation for the strike, the prosecution responded, in part, by stating that the potential juror " 'watches gospel programs as well.' " *Id.* The defendant argued that "as well" amounted to finishing the thought with "as being black." *Id.* at 1114. This Court, however, rejected the argument as "conjecture" and found no basis to overturn the trial judge's ruling. *Id.*

In the case at bar, Tinner argues that asking Mrs. Clardy whether she knew of anyone who filed a discrimination claim amounted to asking her whether she was black or whether her ancestors were slaves. Tinner's argument is misplaced for several reasons. First, United asked the same question to every member of the venire. It did not single out Mrs. Clardy as the only potential juror for this line of questioning. It is far-fetched to assert that United challenged Mrs. Clardy because of her race when all potential jurors were questioned on the same grounds.

Second, United never asked any potential juror about race discrimination claims specifically. Instead, United

concerned itself with anyone who had any connection to any type of discrimination claim – age, gender, race, disability, national origin, or religion. Tinner, however, argues that asking an African-American member of the panel such a question is more likely to result in an affirmative answer. While members of a racial minority group may be more likely to face race discrimination at some point, and therefore, might be more likely to respond affirmatively to such questioning, we cannot determine that a disparate impact on African-American venire members amounts to purposeful discrimination by United. *See Hernandez,* 500 U.S. at 359-60.

Similar to the comparisons in *Alverio* and *Stafford,* asking an African-American venire member whether they have any connection to someone who filed a discrimination lawsuit cannot today be a proxy for asking whether they are black in an effort to exclude the person from the jury on the basis of race. Many people of every age, gender, race, disability, national origin, or religion might answer affirmatively when asked if they have any connection to any type of discrimination. The fact that Mrs. Clardy's sister filed a discrimination claim amounts to coincidence, not purposeful discrimination.[6]

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[6] Tinner's argument is interesting in that he relied on United's questioning to exercise a peremptory strike of his own. Tinner challenged Mr. Kuester, whose company had discrimination charges filed against it in the past. Presumably, Tinner excluded Mr. Kuester because he fell on the side of "management," and Tinner's counsel wanted to ensure a more plaintiff-friendly jury panel. United did not object to the strike of Mr. Kuester, who was white. This type of challenge in jury selection is crucial to the functioning of our adversarial legal system. Just as Tinner's challenge of Mr. Kuester is not indicative

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Accordingly, we hold that the district court correctly found that Tinner failed to establish purposeful discrimination on the part of United in its use of a peremptory challenge to strike Mrs. Clardy. United offered a facially race-neutral explanation for its challenge, and the trial judge did not commit clear error in finding that United's actions were not pretextual. The decision of the district court is affirmed.

3. Tinner urges for a different standard of review

Tinner also argues that this Court should adopt an alternative standard of review for *Batson* challenges. Namely, he argues that we should exercise our supervisory authority within this Circuit and employ a *de novo* review of *Batson* challenges on appeal or establish a trial burden of clear and convincing proof. Neither argument persuades us to alter what has long been established law in this Circuit.

This Court held that a prima facie *Batson* case can be established when a party uses a peremptory challenge to strike the only African-American member of the venire panel. *Morse,* 172 F.3d at 985. The Supreme Court noted that at step two of the *Batson* inquiry, unless the proffered reason is facially discriminatory, it will be accepted as race-neutral. *Purkett,* 514 U.S. at 768. Thus, the persuasiveness of the reason is relevant only at the third step

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of a purposeful effort to exclude whites, United's challenge of Mrs. Clardy is not indicative of its efforts to systematically exclude African-Americans.

and it is at this point that the trial court determines if the reason is pretextual. *Id.* The law in this Circuit clearly establishes that this final determination is a factual one left to the trial judge and reversible only upon a finding of clear error. *Alverio,* 253 F.3d at 940. We decline to establish a trial burden of clear and convincing proof upon a party defending against a *Batson* inquiry. We continue to hold that the clear error test shall govern the review of factual determinations made by the trial court under *Batson.* The district court held that United's proffered reasons were race-neutral and the findings were not clearly erroneous.

B. Tinner's Continuing Violation Claim

This Court reviews the grant of summary judgment *de novo* and draws all reasonable inferences in favor of the nonmoving party. *Filipovic v. K & R Express Sys., Inc.,* 176 F.3d 390, 395 (7th Cir. 1999). Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, requires that a charge of discrimination be filed with the EEOC within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1) (2002). The statute, however, extends the time period for the filing of the charge to 300 days when the aggrieved person initially institutes proceedings with a state or local agency that has the power to grant relief in the situation.[7] *Id.*

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[7] We note, at this point, that the record does not indicate whether Tinner filed a charge with any Indiana state or local agency before filing his EEOC charge on September 3, 1996. The parties assume in their briefs that 300 days is the proper time period, though 180 days

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Following the Supreme Court's recognition of the continuing violation theory in *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977), this Court discussed the three theories under which a plaintiff may establish a continuing violation. *Stewart v. CPC Int'l, Inc.,* 679 F.2d 117, 120-21 (7th Cir. 1982). The first situation occurs when an employer makes employment decisions over time that make it difficult for the employee to determine the actual date of discrimination. *Jones v. Merch's Nat'l Bank & Trust Co. of Indianapolis,* 42 F.3d 1054, 1058 (7th Cir. 1994). This theory is inapplicable in Tinner's case because he points to specific dates and instances where he felt discriminated against – the 1990 debit route transfer, the 1993 Jane Merchant incident, and the 1994 dress code violation. The second theory under which a continuing violation can survive involves an express discriminatory policy of the employer. *Stewart,* 679 F.2d at 121. Likewise, this theory is inapplicable in the case at bar because Tinner does not argue that United relied on an express discriminatory policy in its actions.

So, Tinner's claim must fall under the third theory of a continuing violation, where discrete acts of discrimination are part of an ongoing pattern and at least one of the discrete acts occurred within the relevant limitations period. *Filipovic,* 176 F.3d at 396; *Young v. Will County Dept. of Pub. Aid,* 882 F.2d 290, 292 (7th Cir. 1989). Under this theory, the only issue before this Court is whether Tinner created a genuine issue of material fact regarding

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may well be the correct time frame if Tinner's only action was to file a charge with the EEOC. Ultimately, Tinner's continuing violation claim fails under either time period.

the reasonableness of his not filing a charge with the EEOC until September 3, 1996, given the discrimination he felt as a result of the 1990, 1993, and 1994 incidents, which he now argues are part of a continuing violation. *Filipovic,* 176 F.3d at 396 (stating that "[t]he continuing violation doctrine is applicable only if 'it would have been unreasonable to expect the plaintiff to sue before the statute ran on the conduct' "); *Selan v. Kiley,* 969 F.2d 560, 565-66 (7th Cir. 1992) (asking rhetorically "[w]hat justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one").

Unfortunately for Tinner, the Supreme Court recently settled this question. In *National Railroad Passenger Corp. v. Morgan,* the Court held that a discrete discriminatory act occurs on the day it happens. *Nat'l R.R. Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2070 (2002). According to the Court,

> discrete discriminatory acts are not actionable if time barred, *even when they are related to acts alleged in timely filed charges.* Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred.

Id. at 2072 (emphasis added). While the plaintiff in *Morgan* argued that he suffered from several discriminatory acts while employed by the defendant, the Court held that only those acts that fell within the 300-day period were actionable. *Id.* at 2073. The *Morgan* Court noted that courts may choose to apply equitable doctrines such as tolling or estoppel, "although they are to be applied sparingly." *Id.* at

2072. In the case at bar, Tinner does not urge this Court to adopt either of those equitable doctrines. Therefore, we will not consider the application of such remedies to this case.

Even were we to consider such doctrines, it is unlikely that Tinner would prevail. This Court previously stated that,

> [t]he concept of *cumulation* suggests a critical limiting principle. Acts . . . so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together into a single chain, a single course of conduct, to defeat the statute of limitations.

Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir. 1996) (emphasis in original), *abrogated on other grounds by, Nat'l R.R. Passenger Corp. v. Morgan,* 122 S.Ct. 2061 (2002). In other words, a plaintiff who feels discriminated against by a discrete act, but fails to timely file charges on that act, cannot later reach back to those events when the statute of limitations expires in order to form a continuing violation claim. So, if the employee knew, or with the exercise of reasonable diligence should have known, that each act, once completed, was discriminatory, the employee must sue upon that act within the relevant statutory period. *Jones,* 42 F.3d at 1058; *see also Morgan,* 122 S.Ct. at 2072.

We now consider three additional factors to determine whether a continuing violation claim is actionable: 1) whether the acts involve the same subject matter; 2) the frequency with which the acts occur; and 3) the degree of permanence of the alleged acts of discrimination that should trigger an employee's awareness and duty to assert

his rights. *Filipovic,* 176 F.3d at 396. In *Filipovic v. K & R Express Systems, Inc.,* we held that the name-calling and ethnic slurs to which co-workers subjected the plaintiff on a daily basis over a thirteen-year period prior to the filing of charges could not sustain a continuing violation claim. *Filipovic,* 176 F.3d at 396. Furthermore, there was an eight-year gap in the alleged discriminatory conduct, such that the incidents could not be linked together into a single chain. *Id.* at 397.

Similarly, in *Selan v. Kiley,* this Court held that a two-year gap between allegedly discriminatory acts could not support a continuing violation claim. *Selan,* 969 F.2d at 567. While the acts at question in *Selan* involved the same type of discrimination (racial), they were not frequent enough because of the two-year gap between them. *Id.* Furthermore, the acts once taken were sufficiently permanent, in that they separately and permanently removed managerial duties from the plaintiff. *Id.* Because of their permanent nature, each discrete act should have triggered the plaintiff's awareness of the need to assert or else waive her rights. *Id.*

In the case at bar, Tinner argues that the 1990 debit route transfer, the 1993 Jane Merchant incident, and the 1994 dress code violation all form a continuing violation on United's part that is ultimately related to his alleged wrongful discharge on June 10, 1996. Tinner, however, did not file his discrimination charge with the EEOC until September 3, 1996. While he timely filed his wrongful termination charge, he clearly did not file that charge with the EEOC within either 180 or 300 days of the three incidents in 1990, 1993, and 1994. Tinner cannot now "piggy-back" those earlier events to his timely filed wrongful termination claim to form a continuing violation.

Applying the *Filipovic* factors to the 1990, 1993, and 1994 incidents further demonstrates that each one represented a discrete act that became actionable according to *Morgan* when they occurred. First, Tinner admits that he felt discriminated against on the basis of his race and that he complained after each incident. Second, as in *Selan* and *Filipovic,* these incidents were not frequent enough because there was a six-year, three-year and two-year gap, respectively, between each discrete act and Tinner's termination in 1996. Finally, the degree of permanence surrounding his debit route transfer in 1990 certainly should have made Tinner aware of the need to protect his rights. While the Merchant incident in 1993 and the dress code violation in 1994 appear more sporadic than permanent in nature, Tinner chose not to file charges after either of these events even though he felt discriminated against at the time. Tinner argues that not filing charges after these incidents is a testament to his character to deal with the discrimination and still maintain his productivity as a Sales Representative. Despite this belief, Tinner's failure to file charges sooner kills his late-filed claims.

In short, United's actions cannot be said to form a single chain that supports Tinner's continuing violation claim for racial discrimination. Tinner was not reasonable in waiting until 1996 to file his charge alleging racial discrimination for acts that occurred in 1990, 1993, and 1994, and any claims for those earlier acts were time-barred. For that reason, no genuine issue of material fact existed to preclude summary judgment in favor of United, and the decision of the district court is affirmed.

CONCLUSION

The district court correctly held that United offered facially race-neutral reasons for using a peremptory challenge with Mrs. Clardy, specifically that her sister previously filed a discrimination claim and that Mrs. Clardy described her sister's situation as an "ordeal." The district court also did not commit clear error in holding that Tinner failed to show purposeful discrimination in United's challenge of Mrs. Clardy. Thus, Tinner's *Batson* challenge cannot succeed. Likewise, Tinner failed to show any genuine issue of material fact sufficient to survive summary judgment on his continuing violation claim because the three earlier acts he complained of did not constitute a single chain of discrimination and were therefore time-barred. Accordingly, the judgment of the district court on both counts is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILL TINNER, Plaintiff, v. UNITED INSURANCE COMPANY OF AMERICA, Defendant.	)	Cause No. EV 98-12-C-Y/H

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

On September 30, 1999, this court entered its memorandum decision granting, in part, the defendant's motion for summary judgment. The court did not enter final judgment. Instead, the court allowed the plaintiff to file a more definite statement on a single issue which the court concluded was not specifically addressed by the summary judgment motion. On March 10, 2000, after filing a more definite statement of the plaintiff's claim as required by the court, the plaintiff also filed a motion to reconsider alleging that there were certain new pieces of evidence the court should rely on to reconsider its prior decision on summary judgment. Those pieces of evidence are the affidavits of the plaintiff, Clarence James, Dave Brown and William Tuley, M.D.

Since the September 30, 1999 decision of this court is not a final judgment, the decision about whether to reconsider it falls under Federal Rule of Civil Procedure 54(b). The court may reconsider an interlocutory decision not made final at any time before the entry of judgment

adjudicating all the claims, rights and liabilities of the parties. However, as the defendant points out, motions to reconsider are not favored. District Judge John Daniel Tinder has written a fairly extensive opinion on the purpose of motions to reconsider. *See In re the August, 1993 Regular Grand Jury (Medical Corporation Subpoena I)*, 854 F.Supp. 1403 (S.D.Ind. 1994). A motion to reconsider may be used to correct manifest errors of law or fact; to present newly discovered evidence; or in circumstances in which the merits of an issue vital to the litigation were never addressed because of a litigant's non-culpable procedural default.

In this case, the plaintiff does not suggest that this court committed a manifest error of law, or that an issue vital to the litigation was never addressed by the parties. Rather, the plaintiff seeks to present new evidence by way of affidavits.

The problem with the plaintiff's new affidavits is that they are not "newly discovered evidence." As the defendant points out, all four of the persons who submitted affidavits had been known to be witnesses in this case for a considerable period of time before the filing of the summary judgment motion and entry of the court's order. There is no reason why the evidence now tendered to the court could not have been provided to the court at the time of the response to the motion for summary judgment. Federal Rule of Civil Procedure 56(f) provides a mechanism to allow parties additional time to bring forward evidence at the time of their responses to motions for summary judgment. Once a party opposing summary judgment has foregone the opportunity to extend the time to bring in additional evidence, the court must decide the motion on the evidence which is properly made in response to the

motion. This court concludes that it is not a proper use of the motion to reconsider to allow the party who has lost certain issues on the motion for summary judgment to get a second bite at the apple. That is all that the plaintiff is doing in this case. The court declines to reconsider its prior ruling because the evidence tendered here is evidence which could have been discovered with due diligence prior to the time the motion for summary judgment was briefed. That a party did not understand or recognize the significance of particular evidence until the court had ruled is not a sufficient ground for allowing another set of briefs to address the same issues that the court had previously decided.

The motion to reconsider is **DENIED**.

SO ORDERED this 30 day of June, 2000.

/s/ Richard L. Young
RICHARD L. YOUNG,
DISTRICT JUDGE
United States District Court
Southern District
of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILL TINNER,	)	
Plaintiff,	)	
v.	)	Cause No. EV 98-12-C-Y/H
UNITED INSURANCE COMPANY OF AMERICA,	)	
Defendant.	)	

MEMORANDUM DECISION

This matter is before the court on the defendant's motion for summary judgment filed February 4, 1999. The plaintiff's response was filed on May 5, 1999.[1] The defendant filed its reply on June 1, 1999.

The court, being duly advised, now **GRANTS** the defendant's motion for summary judgment. However, for reasons later stated, final judgment shall not enter at this time.

[1] Plaintiff's response was not in compliance with new local rule 56.1. Because the rule is relatively new, the court will excuse this failure to comply, but plaintiff's counsel is advised that briefs filed in the future may be refused if not in compliance with the new rule.

I. Findings of Fact

A. Introduction

1. Plaintiff, Will A. Tinner ("Tinner"), is a 43 year old black male who was employed as a sales representative at United Insurance Company of America's ("United") Evansville, Indiana office from March 19, 1990 until June 10, 1996. (Affidavit of Angie Petts, ¶ 5; Tinner Complaint, ¶ 5, as admitted in defendant's answer).[2]

2. United is a home service insurance company whose sales representatives sell insurance products, collect premiums and otherwise serve its customers and prospective customers by visiting each customer at his or her home on at least a monthly basis. (Affidavit of Angie Petts, ¶ 2).

3. Sales representatives are assigned a certain geographical area, commonly called a "debit route," in which to sell insurance and service customers and prospective customers. (Affidavit of Angie Petts, ¶ 7).

4. Sales representatives are supervised by staff managers, who in turn report to a district manager. District managers report to regional managers. (Affidavit of Angie Petts, ¶ 6).

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[2] Tinner alleges in his brief that he was the only minority employee of the Evansville, Indiana district office. However, as support for that assertion, he refers to paragraph 8 of his complaint. Defendant denies the truth of that allegation in its answer. Without further evidence to support this claim, the court does not find it to be a fact because under Federal Rule of Civil Procedure 56(e), a party opposing the motion "may not rest upon the mere allegations . . . of [his] pleading."

5. Sales representatives are compensated under a plan based on commissions. (Affidavit of Angie Petts, ¶ 9). Because a sales representative's main income is based on commissions, his or her income may fluctuate from month-to-month due to the level of sales and/or charge backs to his or her commission account as a result of unpaid premiums. (Affidavit of Angie Petts, ¶ 10).

6. Staff managers are also compensated on a compensation plan based on commissions derived primarily from the sales of insurance products by sales representatives under their management. (Affidavit of Angie Petts, ¶ 11).

7. Because of United's pay structure, which is common in the home service insurance industry, a staff manager will often earn somewhat more than the average income of a sales representative on his or her staff, but may earn less than he or she did as a sales representative. (Affidavit of Angie Petts, ¶ 12).

8. A staff manager's main responsibility is to motivate and encourage the sales representatives under his or her supervision to increase their sales and commissions. In doing so, the staff manager's income should increase as well. (Affidavit of Angie Petts, ¶ 13).

9. On or around September 3, 1996, Tinner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Tinner Complaint, p. 7 ¶ 46, as admitted in answer).

10. On or around January 20, 1998, Tinner filed a complaint against United alleging several violations of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, including race discrimination,

color discrimination, retaliation and constructive discharge. (Tinner Complaint, pp. 8-9, as admitted in answer). The events that Tinner alleges are discriminatory are discussed in detail below.

B. Route Transfer (April or May 1990)

11. In or around February 1990, shortly before Tinner began working at United, he was employed as a sales representative at Independent Life and Accident Insurance Company ("Independent"). (Tinner Dep. I, p. 22).[3]

12. Approximately one month after he began working at Independent, United purchased Independent and Tinner became an employee at United. (Tinner Dep. I, p. 31).

13. In April or May of 1990, just after Tinner became a United employee, he was informed that the Evansville, Indiana territory was being realigned and that his debit area was going to change from what he describes as the "white" east side of Evansville to the downtown area of Evansville, which consists of predominantly black public housing projects. (Tinner Dep. I, pp. 35-37; Tinner Complaint, p. 3, ¶ 9).[4]

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[3] Tinner's deposition was taken on two separate days, and separate transcripts were prepared by the court reporters. Therefore, references to his testimony herein will be cited as "Tinner Dep. I" and "Tinner Dep. II."

[4] A copy of a map of Evansville, which is highlighted in yellow to show Tinner's debit route at United, was attached as Exhibit D to defendant's memorandum in support of its motion. During his deposition, Tinner was asked to highlight his debit route on an identical copy

(Continued on following page)

14. Tinner felt that his re-assignment was discriminatory because he believed the client base on his new route was predominantly black or poor, thus making it more difficult to conduct business, and because he felt the tone of the meeting was hostile. (Tinner Dep. I, pp. 36, 93).

15. While the company maintained statistical data and demographic information on "mix of incomes, ages, sexes, races . . . " at one time, Tinner does not now have any statistical evidence to show the racial makeup of the downtown Evansville debit route. (Tinner Dep. I, pp. 74-75).

16. Tinner believed his re-assignment was discriminatory and protested it at the initial meeting, but does not recall ever complaining about his new debit area after his transfer. (Tinner Dep. I, pp. 36, 81-82; Tinner Dep. II, p. 6).

17. During the six years he was employed at United, Tinner was assigned to the downtown debit route. (Affidavit of Angie Pets, ¶ 8).

18. Despite the fact that many of the clients were in arrears in his route, Tinner believes he excelled in his new route. "In fact, I did better than anyone else ever has or probably ever will." (Tinner Dep. I, pp. 37, 93).

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of the attached map. (Tinner Dep. I, pp. 55-57). United requested that the court take judicial notice that Exhibit D accurately depicts the Evansville area and/or is admissible evidence as an exception to the hearsay rule as a published compilation "generally used and relied upon by the public or by persons in particular occupations" under Federal Rule of Evidence 803(17).

C. Jane Merchant (Spring 1993)

19. Jane Merchant ("Merchant"), who is white, was the office administrator at United in the spring of 1993. (Tinner Dep. I, pp. 97, 101).

20. Merchant's duties included both taking phone messages for sales representatives, typing and other clerical functions. (Tinner Dep. I, pp. 101-03).

21. In the spring of 1993, Tinner asked Merchant to do some paperwork for him in what he believed was an appropriate manner. (Tinner Dep. I, p. 97).

22. The next day he was called into a meeting with the district manager and his staff manager and was told that Merchant complained about the manner in which he asked her to perform his work. (Tinner Dep. I, pp. 98-99).

23. Tinner requested that Merchant be asked to come into the meeting and explain her complaint. (Tinner Dep. I, p. 99).

24. Merchant was asked into the meeting and "recanted" her complaint about what has been said, but indicated that she was intimidated by the way he "carried himself." (Tinner Dep. I, p. 99). Tinner speculates that Merchant was not accustomed to receiving normal requests from a black man. (Tinner Dep. I, p. 97).

25. As a courtesy, Tinner voluntarily apologized to Merchant for anything he said to her that was "untoward." (Tinner Dep. I, p. 100).

26. After Merchant left, the district manager requested that Tinner be careful about the way he requested Merchant's assistance in the future because she was apparently intimidated by his "size and presence." Tinner

knows of no similarly situated white agents who were cautioned in this same manner. (Tinner Dep. I, p. 100).

27. Tinner did not feel that the district manager intended to be discriminatory when he cautioned Tinner about the way he requested work from Merchant. (Tinner Dep. II, pp. 11-12).

28. Tinner was not formally disciplined in any way, but he felt that this incident was discriminatory at the time it occurred. (Tinner Dep. I, p. 116; Tinner Dep. II, pp. 11-13).

D. Dress Code Violation (Winter 1994)

29. In the winter of 1994, a heavy snowfall hit Evansville. (Tinner Dep. I, p. 134).

30. During that time, Tinner attended a sales meeting at United dressed in a pair of nice starched jeans, well-starched shirt and sneakers. (Tinner Dep. I, p. 135).

31. Although Tinner had not been given a copy of the dress code before the date of the snowstorm, United's dress code at the time required agents to wear a tie and dress slacks. (Tinner Dep. I, p. 145). His typical work attire included a starched shirt, suit jacket, matching tie and shined shoes. (Tinner Dep. I, p. 134). However, other non-minority agents wore cowboy boots, wrinkled shirts and disheveled clothing which sometimes included shirts with dirty collars. (Tinner Dep. I, p. 135).

32. After arriving at the office, Tinner was called into the district manager's office and was instructed to go home and change clothes in order to conform with United's dress code. (Tinner Dep. I, pp. 135-38). There were other

non-minority agents at the office in cowboy boots, wrinkled shirts and looking disheveled who were not asked to go home and change.

33. The district manager informed Tinner that he could change back into casual clothes after the meeting in order to service his debit route. (Tinner Dep. I, p. 138).

34. Tinner went home, changed into proper attire, and came back to the office for the sales meeting. (Tinner Dep. I, p. 138).

35. After the meeting, Tinner changed into casual clothes to service his debit route. (Tinner Dep. I, p. 139).

36. Tinner did not ask permission to wear casual clothes before the sales meeting that day. (Tinner Dep. I, p. 152).

37. The day after the sales meeting, the district manager presented him with a written warning concerning his dress and asked him to sign it, but Tinner refused and left the room. (Tinner Dep. I, pp. 141-42).

38. A few minutes later, in a telephone conference with the regional manager in which Tinner and the district manager were present, the regional manager told Tinner that he did have to sign the written warning. (Tinner Dep. I, p. 144).

39. Tinner admitted that it was not made a condition of his employment that he sign the dress code warning and, in fact, he never signed it. (Tinner Dep. 1, p. 145).

40. Tinner also thought that this incident was discriminatory at the time it occurred. (Tinner Dept. II, p. 15). He believed a co-worker, Charlie Kull, banged into

his car in the parking lot on the date of the incident to cause him additional difficulties at work. (Tinner Dep. I, p. 271).

E. Offer of Promotion (May 1996)

41. In May 1996, a staff manager position became available at United's Evansville office. (Tinner Dep. I, p. 153).

42. District manager Angie Petts ("Petts") informed Tinner about the open position, told him he was the most qualified applicant, and encouraged him to apply for it. (Tinner Dep. I, pp. 153-55).

43. Tinner applied for the open staff manager position although the "monetary gain and those type of things weren't that significant in that job" to him. (Tinner Dep. I, p. 155).

44. On May 12, 1996, Tinner and Petts traveled to Dayton, Ohio, to meet with United's regional vice president John Conlan ("Conlan") and director of marketing Don Merkel ("Merkel") about the staff manager position. (Tinner Dep. I, p. 156).

45. They met in Dayton hotel at approximately 7:00 p.m., had dinner, and at approximately 11:00 p.m., they went to Merkel's hotel room in order to conduct the interview. (Tinner Dep. I, pp. 161, 168).

46. The interview was conducted by Conlan, and although Petts and Merkel were present, they did not participate in the interview. (Tinner Dep. I, pp. 169, 174-75).

47. Tinner felt that Conlan was not serious about the interview because he had not reviewed Tinner's employment

record at United before the interview. (Tinner Dep. I, p. 172.)

48. Conlan began the interview by asking Tinner about the responsibilities of a sales representative. Tinner felt Conlan's questions "were questions you'd ask an agent that was a first year novice." (Tinner Dep. I, p. 169).

49. Conlan then asked Tinner questions about his sales record. (Tinner Dep I, p. 169). Tinner resented that Conlan asked him about a period when his sales performance was down, instead of focusing on Tinner's successes. (Tinner Dep. I, p. 170).

50. Near the end of the interview, Conlan asked Tinner what his average weekly salary had been during his tenure at Untied. (Tinner Dep. I, pp. 175-76). Tinner responded that he earned an average of $640.00 per week. (Tinner Dep. I, pp. 175-76).

51. Conlan then offered Tinner the staff manager position at a salary of $650.00 per week plus a $40.00 per week car allowance. (Tinner Dep. I, p. 177).

52. At that time, the staff manager position in the Evansville office came with a $600.00 per week salary and a $40.00 per week car allowance. (Affidavit of John Conlan, ¶ 8).

53. Conlan offered Tinner more, however, because Conlan felt that Tinner's experience and past performance justified a higher starting salary. (Affidavit of John Conlan, ¶ 9).

54. Tinner saw the offer of promotion as "bogus" because, although he was offered more money than his average salary, he was offered less money than he was

making at that particular time, which was $752.00 per week. (Tinner Dep. I, p. 178).

55. During the previous year of 1995, however, Tinner earned a salary of $29,337.03, which is an average of only $564.27 per week. (Tinner Dep. II, p. 132).

56. Tinner does not know what other staff managers' initial salaries were, or if they experienced a pay cut when first promoted to a staff manager position. (Tinner Dep. I, p. 182).

57. Tinner asked for some time to think about the offer. (Tinner Dep. I, p. 178).

58. Tinner was obviously concerned about the staff he would be supervising if he accepted the promotion. (Tinner Dep. I, p. 183). Tinner stated: "I wasn't going to earn any commissions. The staff was dead in the water, shot in the foot. The other agents weren't performing and were leaving." (Tinner Dep. I, p. 183).

59. Tinner decided to reject Conlan's offer, and the morning after the interview Tinner asked Petts if Conlan would be willing to offer $690.00 per week plus the $40.00 car allowance. (Tinner Dep. I, p. 180).

60. On May 14, 1996, the following Tuesday after Tinner's interview in Dayton, Tinner found a note on his desk from Petts, stating that Conlan had been impressed with Tinner but Conlan was concerned about Tinner's salary expectations and did not want to build false hope. (Tinner Dep. I, pp. 192, 194).

61. In her note, Petts requested that Tinner put his salary request, and his explanation of why he felt this

salary request was warranted, in writing. (Tinner Dep. I, p. 194).

62. Tinner never put his salary request in writing. (Affidavit of Angie Petts, ¶ 21).

63. According to Tinner, Petts informed Conlan of Tinner's counteroffer for $690.00 per week plus a $40.00 car allowance; Conlan rejected Tinner's counteroffer, and Petts then informed Tinner that the job offer was no longer open to him. (Tinner Dep. 1, p. 210).

64. According to Petts, Tinner came to her and informed her that he had decided to remain a sales representative because he was concerned about having to maintain his own debit route and the additional responsibility of managing other sales representatives. (Affidavit of Angie Petts, ¶¶ 22, 23).

65. In any event, the parties agree that on Wednesday, May 15, 1996, Tinner was no longer under consideration for the promotion. (Tinner Dep. I, p. 212; Affidavit of Angie Petts, ¶ 24).

66. On May 30, 1996, Petts announced that Dave Brown ("Brown"), another sales representative in the Evansville office, was being promoted to the staff manager position. (Affidavit of Angie Petts, ¶ 25).

67. Brown is white and accepted a salary of $600.00 per week and a $40.00 per week car allowance, which is the salary that originally came with the staff manager position. (Affidavit of Angie Petts, ¶ 26).

F. Vacation Request and Alleged Constructive Discharge (June 1996)

68. On or around May 30, 1996, Tinner requested from Petts that he be allowed to take a week-long vacation from June 10, 1996, to June 14, 1996. (Tinner Dep. I, pp. 220, 227). Petts responded to his request with the joking remark: "Don't you know, you only get one vacation every four years." (Tinner Dep. I, pp. 224, 227).

69. When requesting a vacation, United employees frequently, but not always, fill out and turn in a written vacation request form, which Tinner did on May 30, 1996. (Tinner Dep. I, pp. 224, 247).

70. Each vacation request had to be approved by the district manager, who at that time was Petts. (Affidavit of Angie Petts, ¶ 29).

71. Tinner had previously taken vacation on or around April 15, 1996 (1 week), February 23, 1996 (1 day), October 9, 1995 (1 week), May 15, 1995 (1 week), and October 10, 1994 (1 day). (Tinner Dep. I, pp. 230-35).

72. Before taking the vacations listed above, Tinner's requests were submitted in writing and signed and approved by Petts. (Tinner Dep. I, pp. 230-35).

73. Tinner's request for a vacation from June 10, 1996, to June 14, 1996, was never approved by Petts. (Tinner Dep. I, p. 235).

74. At United, sales representatives are expected to increase the sales on their debit route by an average of at least $50.00 a month. (Affidavit of Angie Petts, ¶ 31).

75. At the time Tinner requested his vacation, his May increase was minus $257.59, and his total increase

for that year was only $20.72. (Affidavit of Angie Petts, ¶ 32).

76. Petts found these results unacceptable and denied Tinner's vacation. (Affidavit of Angie Petts, ¶ 33).

77. Tinner felt sick and had back and leg pain on May 31, 1996. (Tinner Dep. I, p. 249).

78. On June 3, 1996, just a few days after Tinner requested a vacation, Tinner telephoned United's office administrator and told her that he would not be into work because he was sick. (Tinner Dep. I, p. 249).

79. At this time, Tinner did not present any doctor's excuse as to why he could not work. (Affidavit of Angie Petts, ¶ 36).

80. It was United's policy for a sales representative to contact his staff manager or the district manager when he or she was too ill to work, which Tinner never did. (Affidavit of Angie Petts, ¶¶ 35, 36).

81. Tinner was absent from work the entire week of June 3, 1996. (Affidavit of Angie Petts, ¶ 37).

82. On June 4 and June 5, 1996, Petts phoned Tinner at home but never reached him. (Affidavit of Angie Petts, ¶ 38).

83. On June 6, 1996, Petts finally reached Tinner by phone and informed him that the time off for his illness would be considered vacation, and that he was to report to work on June 10 or have a doctor's excuse as to why he could not work. (Affidavit of Angie Petts, ¶ 39; Tinner Dep. I, p. 251).

84. The next day Tinner received a letter from Petts dated June 6, 1996, informing him that he needed to return to work on June 10 or furnish a doctor's note excusing him from work. (Tinner Dep. I, p. 251; Affidavit of Angie Petts, ¶ 40). Petts' letter also stated that if Tinner did not show up for work or provide a doctor's excuse, that it would be assumed he chose to terminate his employment with United. (*Id.*)

85. Petts' letter also informed Tinner that his absence from work the week of June 3, 1996, would be considered vacation. (*Id.*)

86. On the morning of June 10, 1996, Tinner went to United's office and gave United's office administrator written notice that his last day of work would be June 21, 1996. (Tinner Dep. I, p. 258).

87. Tinner also gave the office administrator a "Certificate to Return to Work" statement, signed by his doctor and stating that Tinner was able to return to work on June 10, 1996. (Tinner Dep. I, p. 258).

88. Despite being released to work by his doctor, Tinner did not return to work on June 10, 1996. (Tinner Dep. I, p. 271).

89. In a letter dated June 11, 1996, Petts notified Tinner that his employment with United ended as of June 10, 1996, due to his failure to show up for work. (Affidavit of Angie Petts, ¶ 43).

90. In the letter, Petts also informed Tinner that because he provided a doctor's note on June 10, 1996, which verified his illness, his absence the week of June 3 would be considered a disability leave, rather than vacation. (Affidavit of Angie Petts, ¶ 43).

II. Discussion

A grant of summary judgment is appropriate when the pleadings and other submissions to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). To determine whether a genuine issue of material fact exists, a court must construe the facts in a light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the mere existence of "some metaphysical doubt as to the material facts" is insufficient to defeat a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The defendant suggests that relevant dates in this case can be summarized by the following time line:

March 19, 1990	Tinner became an employee of United.
April or May 1990	Tinner assigned new debit route.
Spring 1993	Jane Merchant registers complaint against Tinner regarding his request for assistance.
Winter 1994 (probably January 19, 1994)	Tinner violates United's dress code.
May 1996	Tinner interviews for open staff manager position.
June 3, 1996	Tinner informs United's office administrator that he was ill and would not be in to work.

June 6, 1996	Petts informs Tinner by letter to report to work on June 10 or provide a doctor's excuse.
June 10, 1996	Tinner provides United's office administrator with a "Certificate to Return to Work" signed by his doctor stating that Tinner could return to work on June 10, 1996. Tinner, however, fails to return to work and instead gives written notice of his constructive discharge.
September 3, 1996	Tinner files charge of discrimination with the EEOC.

The defendant raises five issues in its motion for summary judgment. The court will address them in the order raised in the defendant's brief.

Issue 1: Are several of Tinner's Title VII claims time-barred?

Defendant argues that Tinner's allegations regarding his route transfer, the Jane Merchant incident, and the dress code violation are time-barred and should be dismissed. Title VII requires that an aggrieved person first file a timely charge with the EEOC before he files suit in federal court. *Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1373*, 772 F.2d 348 (7th Cir. 1985); 42 U.S.C. § 2000e-5(c). Generally, a charge of discrimination must be filed within 180 days after the alleged unlawful employment practice

occurred, unless there is a state or local agency with appropriate authority to seek redress for the plaintiff's charge. *Vitug v. Multistate Tax Comm'n.*, 88 F.3d 506, 511 (7th Cir. 1996). If the latter applies, then the EEOC's jurisdiction is deferred for a short period, and a plaintiff has 300 days after the allegedly discriminatory conduct in which to file a claim. *Id.* This limitations period serves to protect employers from the burden of defendant claims arising from employment decisions that are long past. *Black v. Rieth-Riley Const. Co., Inc.*, 957 F.Supp. 177 (S.D. Ind. 1997). In this case, because Indiana is a deferral state, Timer's charge would be timely only if filed within 300 days after an alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(c).

Tinner filed his charge of discrimination on September 3, 1996. Therefore, for his complaint to be timely, Tinner must have been discriminated against sometime between November 8, 1995 (300 days before his charge was filed) and September 3, 1996.

As findings of fact 11 through 40 establish, three of the alleged discriminatory acts Tinner complains of occurred outside the appropriate time period. His route transfer occurred in April or May 1990, more than six years before he filed his charge of discrimination. The incident with Jane Merchant occurred in the spring of 1993, more than three years before he filed his charge of discrimination. The dress code violation occurred in the winter of 1994, nearly two years before he filed his charge of discrimination.

Tinner, however, contends that these acts are timely under the "continuous violations theory." (Plaintiff's brief, p. 19). The Seventh Circuit recognizes three different

continuing violation theories. The first theory relates to hiring and promotion decisions where the employer's decision-making takes place over time, making it difficult to determine the actual date of the alleged discriminatory act. In these cases, the statute of limitations begins running when the plaintiff knows that the decision has been made. *Jones v. Merchants National Bank & Trust Company of Indianapolis*, 42 F.3d 1054, 1058 (7th Cir. 1994). The second theory involves an employer's clear and express policy that is alleged to be discriminatory (*i.e.*, a policy which forces women to retire at an earlier age than men). *See Stewart v. CPC Intern., Inc.*, 679 F.2d 117, 121 (7th Cir. 1982). This theory clearly is not applicable in this case. The third theory involves a series of discrete acts over a period of time which are allegedly discriminatory (*i.e.*, the successive rejection of applications for a training program or promotion). *Id.*

Recently, the Seventh Circuit restated the continuing violation theory in *Filipovic v. K & R Express Systems, Inc.*, 176 F.3d 390, 396 (7th Cir. 1999), as follows:

> The continuing violation doctrine allows a complainant to obtain relief for a time-barred act of discrimination by linking it with acts that fall within the statutory limitations period. See *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir.1992). Courts will then treat the series of acts as one continuous act ending within the limitations period. *See id.* Courts will consider three factors in making this determination: (1) whether the acts involve the same subject matter; (2) the frequency at which they occur; and (3) the degree of permanence of the alleged acts of discrimination, "which should trigger an employee's awareness of and duty to assert his or her rights." *Id.* at 565.

> The continuing violation doctrine is applicable only if
>
> > it would have been unreasonable to expect the plaintiff to sue before the statute ran on th[e] conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.
>
> *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir.1996) (citation omitted). In Galloway, this Court recognized the "critical limiting principle" that "[a]cts of . . . harassment so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together in a single chain, a single course of conduct, to defeat the statute of limitations." *Id.* at 1166 (citation omitted).

As to Tinner's claim about the transfer of his route, this is a type of adverse actionable treatment that could be recognized immediately as discrimination, and without regard to events that later occurred. In fact, Tinner recognized that the transfer was discriminatory and would adversely affect his income from commissions. (Finding of fact 14). As such, it does not fit within the continuing violation theory.

As to the other two incidents, it is clear that plaintiff did not receive any formal disciplinary action as a result of either of these two incidents. The Merchant and dress code episodes do not address the same subject matter as the later job termination (which purportedly had to do with vacation denial) and were not frequent (*i.e.*, only these two incidents occurred within a three-year period between the

spring of 1993 and June 1996). While the degree of permanence attached to the acts of discrimination is slight here, Tinner admits he believed the acts were discriminatory at the time they occurred (Findings of fact 28, 40). In viewing these factors together, this court concludes that the discriminatory conduct alleged in these two incidents were so discrete in time and circumstance that they cannot be reasonably linked together in a "single course of conduct" with his later termination. The continuing violation doctrine does not, therefore, apply to these claims, and all three are barred by the applicable limitations doctrine and are hereby **DISMISSED**.

Tinner argues in his brief that these three instances raise a claim of a hostile work environment. (Plaintiff's brief, p. 20).

Filipovic also addresses this issue:

> To create a hostile work environment, "the conduct at issue must 'ha[ve] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'" *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir. 1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986)). Title VII affords employees protection "against conduct which is sufficiently severe or pervasive that a reasonable person would find it hostile and which the victim himself subjectively sees as abusive." *Ngeunjuntr v. Metro. Life Ins. Co.*, 146 F.3d 464, 467 (7th Cir.1998) (citation omitted).

Filipovic, 176 F.3d at 397-98.

The three incidents at issue here, occurring over a period of time from April 1990 to January 1994, are simply not sufficiently severe or pervasive that a reasonable person would find them hostile. The actions did not unreasonably interfere with Tinner's work performance during this time period, as by his own admission he excelled at his job performance. (Finding of fact 18). Therefore, to the extent plaintiff is alleging claims of a hostile work environment throughout this time period, those claims are also **DISMISSED.**

Issue 2: Was Tinner discriminated against in the offer of promotion?

Regarding the offer of promotion, in order to establish a prima facie case of disparate treatment, Tinner must demonstrate: (1) that he belonged to a protected class; (2) that he applied and was qualified for a particular position; (3) that he was not offered the position; and (4) that the position remained open to others after the plaintiff was rejected. *Vitug v. Multistate Tax Comm'n.*, 88 F.3d 506, 515 (7th Cir. 1996), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If Tinner establishes a prima facie case, United then has the burden of producing a legitimate, nondiscriminatory reason for its actions. *Vitug*, 88 F.3d at 515. However, the ultimate burden of proving discrimination remains at all times with Tinner. *Id.*

Tinner's claim fails here because it is undisputed that he was offered the promotion. (Finding of fact 51). Tinner thought the offer was "bogus" because he was offered less money than he was making at that particular time. (Tinner Dep. I, p. 178). But findings of fact 4 through 7

establish that a staff manager may receive more or less than a particular sales representative may be earning. A sales representative's salary fluctuates month-to-month depending on the level of sales and/or charge backs to the sales representative's account as a result of unpaid premiums. (Finding of fact 5). At the time he was offered the promotion, Tinner was making $752.00 per week, but his average salary during his employment at United was only $640.00 per week. (Finding of fact 50). The salary Tinner was offered with the promotion was $650.00 per week plus a $40.00 per week car allowance, which was greater than his average salary, and was greater than the salary originally established for the position. (Finding of fact 52). The white individual who was later given the position was offered and accepted the position at a lower rate of pay than that offered to plaintiff. (Finding of fact 67). Based on these undisputed facts, this court concludes that no reasonable jury could conclude that the offer was "bogus" or not a genuine offer.

Therefore, Tinner has failed to show that he was not offered the position. He has failed in his burden of a prima facie case of discrimination, and any claim for denial of a promotion is hereby **DISMISSED**.

Issue 3: Was the denial of Tinner's vacation and the order for him to return back to work an act of discrimination?

Tinner alleges that United, by denying his one-week vacation request and ordering him back to work, denied him the same vacation and equal treatment afforded to similarly situated white sales representatives. (Tinner Complaint, p. 7). In order to make out a prima facie case, Tinner must show: (1) he is a member of a protected class;

(2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) similarly situated employees received more favorable treatment. *Day v. Northern Indiana Public Service Co.*, 987 F.Supp. 1105, 1109 (N.D. Ind. 1997). If he does establish a prima facie case, United then has the burden of producing a legitimate, nondiscriminatory reason for its actions. *Id.*

Defendant argues that Tinner has not proven United's actions were discriminatory because (1) he has failed to prove that he suffered an adverse employment action, and (2) he has failed to show that similarly situated employees received more favorable treatment.

"Adverse employment action" is a term subject to much dispute among the cases decided to date. It appears in several contexts, including in claims of retaliation, and in cases discussing when the employer may raise the so-called *Ellerth* defense to charges of discrimination in hostile environment cases. Adverse employment actions are not limited solely to reduction of pay or monetary benefits. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996). However, instances of different treatment are not materially adverse if they have little effect on the employee's job. *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998).

In this case, the undisputed facts show that Tinner had been granted vacation on several occasions before, but was denied vacation on one particular occasion. The denial of a vacation on one particular occasion, when the record clearly indicates it had been granted on several other occasions, can have only little effect on the employee's job overall. This court, therefore, concludes that a one-time denial of vacation is not an adverse employment action,

and Tinner fails in his burden of establishing a prima facie case of discrimination on this point. Moreover, even assuming that denial of vacation is an adverse employment action under Title VII, Tinner has here failed to identify any other similarly situated employees that were treated more favorably.[5] Without some proof of this element, Tinner fails to establish a prima facie claim of discrimination in the denial of his vacation, and this claim must therefore be **DISMISSED.**

Issue 4: Was Tinner constructively discharged?

Tinner alleges that United's denial of his one-week vacation request and ordering his return to work resulted in his constructive discharge. (Tinner's Complaint, p. 9). To state a claim for constructive discharge, Tinner must prove: (1) his working conditions were so intolerable that a reasonable person would have been compelled to resign, and (2) that he was constructively discharged because of his membership in a protected class. *Chambers v. American Trans. Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994). The working conditions need to be more than merely intolerable; they need to be intolerable in a discriminatory way. *Chambers*, 17 F.3d at 1005. Even conditions that might be adequate to establish a hostile working environment under Title VII will not necessarily establish a constructive discharge. *Landgraf v. USI Film Products, Inc.*, 968

[5] Tinner makes reference in his brief (p. 31) to his knowledge that no similarly situated non-minority employees were ever denied vacation. However, there is no reference to anywhere in the plaintiff's materials in opposition where he identifies any non-minority individuals who received more favorable treatment.

F.2d 427 (5th Cir. 1992), *aff'd.* 114 S.Ct. 1483 (1994). Furthermore, "[a]n employee must seek legal redress in his or her job unless confronted with an 'aggravated situation' beyond 'ordinary' discrimination." *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), quoting *Bailey v. Binyon*, 583 F.Supp. 923, 929 (N.D. Ill. 1984).

This court agrees with the defendant that Tinner has failed to present facts to show that he was constructively discharged. First, as the court has discussed in issue 1 above, the events described by Tinner occurring before 1996 were not sufficiently severe and pervasive to constitute a hostile environment. Second, Tinner has failed to show any other working conditions which were so intolerable that a reasonable person would have resigned. He merely points to the fact that his vacation request was denied and that he was ordered to return to work. This court concludes that a reasonable person would not have felt compelled to resign after six years of employment simply because his or her one-week vacation was denied, even if the denial was allegedly discriminatory. Tinner's allegations simply do not meet the high standard necessary to show a constructive discharge. For this reason, these claims for constructive discharge must be **DISMISSED**.

Issue 5: Has Tinner proven his retaliation claim?

Tinner alleges that he suffered retaliation "because of his protests and complaints of the hostile work environment and discrimination which he was subjected to on the basis of his color and race." (Tinner Complaint, p. 9). In order to establish a prima facie case of retaliation, Tinner must show: (1) that he engaged in statutorily protected

expression; (2) that he suffered an adverse action by his employer; and (3) that there was a causal link between the protected expression and that adverse action. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 885 (7th Cir. 1998).

The first element of the prima facie test requires that Tinner engage in statutorily protected expression. In this case, there is no indication that Tinner filed any type of formal charge of discrimination prior to his discharge. Whether complaints of discrimination voiced to immediate supervisors meet any legal test for statutorily protected action need not be addressed here.

The only "protest and complaints" Tinner describes in his complaint occurred shortly after Tinner's route transfer and perhaps immediately after the dress code incident. (Findings of fact 16, 37, 40). As discussed above, Tinner's route transfer and the dress code violation, and therefore his complaints about these events, occurred in 1990 and 1994.

Because of the lapse of time between these incidents and his termination, Tinner has failed to show a causal connection between his alleged protests and United's alleged adverse actions. A close temporal connection between protected activity and an adverse action may be enough to satisfy the causation element of a prima facie case of retaliation; however, as the temporal distance between the two events increases, the likelihood of a causal link decreases. *Day v. Northern Indiana Public Service Co.*, 987 F.Supp. 1105, 1114 (N.D. Ind. 1997). In this case, Tinner's alleged protest in April or May 1990 about his route transfer and his alleged protest in the winter of 1994 about the dress code violation occurred

years before the next allegedly discriminatory acts of termination. Considering these vast time differences, Tinner has failed to show that he suffered any retaliation. Therefore, any retaliation claim is **DISMISSED**.

III. Conclusion

While the defendant's motion for summary judgment is well taken in the aspects it has raised, it is not clear to this court that the motion resolves all of this case. One remaining cause of action may exist.

Tinner alleges in his deposition that on June 10, 1996, he notified United that his constructive discharge would be effective June 21, 1996. He now alleges that his discharge was made effective on June 10, 1996, by defendant. This raises the issue of whether Tinner could be said to have been terminated ten days prior to the time that he intended to leave employment.

Tinner does not make clear to this court how this allegation fits into a "constructive discharge" claim. To the extent Tinner could argue that he was discharged ten days prior to the time he was ready to leave employment, he has perhaps raised an improper termination claim for a ten-day period. (*See* Complaint, ¶¶ 43-45). It would appear that this claim would exist only under counts I and II of the complaint, if that decision to terminate him ten days earlier than he intended to leave was based on race or color discrimination.

Plaintiff has not argued this in his brief, and in this age of notice pleading it is not clear whether he intends to do so. If he intends to do so, plaintiff is **DIRECTED** to file a more definite statement pursuant to Federal Rule of

Civil Procedure 12(e) within twenty (20) days of the date of this order. The more definite statement shall plead with specificity the basis upon which the claim is made. In light of the state of discovery in this case, plaintiff shall include in any pleading specific reference to portions of the discovery to date that suggest why this claim will survive a motion for summary judgment.

Defendant shall file any additional motions for summary judgment within thirty (30) days of the date that plaintiff files his more definite statement. Response and reply shall be pursuant to local rule 56.1.

In the event plaintiff chooses not to file a more definite statement, the court will construe that failure as a waiver of any such claim. At that time, final judgment shall enter.

SO ORDERED this 30 day of September, 1999.

/s/ Richard L. Young
Richard L. Young, District Judge
United States District Court
Southern District of Indiana

USCA CONST Amend XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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28 U.S.C.A. § 1870

§ 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause of favor, whether to the array or panel or to individual jurors, shall be determined by the court.

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28 U.S.C.A. § 1862

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in

the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

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28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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42 U.S.C.A. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

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42 U.S.C.A. § 2000e-3

§ 2000e-3 Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual,

or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * *

USCA CONST Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCA CONST Amend. XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

FEB 24 2003
OFFICE OF THE CLERK

No. 02-1049

In the

Supreme Court of the United States

WILL TINNER,

Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Tinner's Petition for a Writ of Certiorari (hereinafter "Petition") should be denied because the proper standard for a peremptory challenge of a minority juror is well-settled, uniformly applied in the lower courts and there is no need for a change in the standard of review. Both the trial court and the Seventh Circuit properly applied this Court's *Batson* jurisprudence in finding the peremptory challenge did not violate the Equal Protection Clause. There is neither an egregious error this Court must address to redress a wrong nor a compelling reason to grant a writ of certiorari.

I.
THE FACTS AND ISSUES PRESENTED IN *MILLER-EL* ARE NOT ANALOGOUS TO THE CASE AT BAR

Tinner asserts that his Petition presents essentially the same question as that before this Court in *Miller-El v. Cockrell*, U.S. Supreme Court Docket No. 01-7662, a death penalty case arising out of Dallas County, Texas, in which the defendant, Miller-El, seeks habeas relief from a capital murder conviction. (Petition p. 2, 3.) But the facts of this case and the procedure followed by the lower courts are not comparable to the facts or procedure in *Miller-El*, except that in both cases the petitioner alleges error occurred during jury selection. *See Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).

A. There is No Evidence of Intent to Discriminate Such as that Alleged in Miller-El.

In the present case, there is no historical background of discrimination such as that alleged by Miller-El to have occurred in Dallas County, Texas. Unlike *Miller-El*, there is no statistical evidence in this case supporting an inference of discrimination, no prosecutor's manual with instructions to consider ethnicity in jury selection, and no allegation of pattern and practice discrimination. There is no other circumstantial evidence of discrimination such as the notations regarding race and gender on jury cards or questionnaires, the disparate questioning of minority jurors or the "jury shuffle" which occurred in *Miller-El*. Indeed, Tinner himself admits that no such circumstantial or statistical evidence of discrimination exists in this case. (Petition p. 3.)

Miller-El was tried to a jury approximately one month before this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). After the case was remanded, the trial judge conducted a *Batson* hearing over two years after *voir dire* was conducted and the prosecutor gave his contemporaneous reasons for striking the jurors. (Transcript of Oral Argument p. 6.)[1] During the more than two years after the *voir dire* in *Miller-El*, the same trial judge presided over jury selection in more than two dozen cases, likely with numerous *Batson* challenges and explanations. Thus the ability of that judge to accurately recall and evaluate juror testimony, voice inflection, gestures, emotions, body language and other traits in concert with trial

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[1] Transcript of Oral Argument, October 16, 2002, Docket No. 01-7662.

counsel's demeanor and conduct presented a unique situation not even remotely similar to the facts in this case.

B. The Undisputed Facts Show the Jury Selection in This Case is Not Comparable to that In *Miller-El*.

During *voir dire* in the present case two prospective jurors responded to the same question:

> Do any of you know anyone who's filed a suit alleging discrimination of any kind? If you do, do you know – anybody know of or heard of anybody who's filed a suit alleging discrimination?

(Trial Trans. p. 56, ll. 14-17.) Prospective Juror Kuester, a white male, and Prospective Juror Clardy, a black female, answered affirmatively to this question. (Trial Trans. p. 56, ll. 14-24.) Mr. Kuester had stated earlier in response to questions by Tinner's trial counsel:

> I think I could be fair. You should probably know that my corporation has – have not personally been involved in any lawsuits, but we have been accused of racial discrimination, and it was never – it was never – one case, there was a complaint filed with the EEOC, and they came back with a ruling that there was no indication of discrimination.

(Trial Trans. p. 41, l. 22—p. 42, l. 3.) When asked if the fact his company had been accused of race discrimination would make it difficult for him to listen to Tinner's case and hear it fairly, Mr. Kuester

responded, "I don't think so." (Trial Trans. p. 42, ll. 4-7.) Mr. Kuester went on to state with regard to race discrimination:

> I know it goes on. There are – I think there are cases where discrimination is claimed where there possibly was none, but there's certainly racial discrimination that's ongoing in our country. It's not right.

(Trial Trans. p. 42, ll. 18-24.)

In response to the same question, Prospective Juror Clardy stated that her sister had filed a discrimination claim. (Trial Trans. p. 56, l. 23—p. 57, l. 1.) When counsel for United Insurance followed up on the response and inquired whether the fact that her sister had filed a lawsuit alleging discrimination would affect her determination in this case, Ms. Clardy responded:

> It's hard to say because I didn't go through the courts with her. Basically, I know what happened or what she told me was her ordeal, but as far as the company she was working with, you know, I don't know.

(Trial Trans. p. 57, ll. 3-9.)

Counsel for Tinner exercised one of his peremptory challenges to strike Mr. Kuester. (Trial Trans. p. 68, ll. 17-19.) Counsel for United Insurance exercised one of his peremptory challenges to strike Ms. Clardy. (Trial Trans. p. 68, l. 24.) Tinner's trial counsel immediately challenged the strike of Ms. Clardy and the trial court conducted a contemporaneous *Batson* hearing. The trial court evaluated United Insurance's

articulated reason for the peremptory challenge—Ms. Clardy's sister had filed a similar discrimination claim against her employer and that she characterized the situation as an "ordeal", the demeanor of the prospective juror and trial counsel during the questioning, and the demeanor of trial counsel during the *Batson* hearing. (Trial Trans. p. 70, ll. 1-6.) The court ruled that United Insurance's explanation was not a pretext for discrimination, reasoning that the fact Ms. Clardy "had a family member involved in the same type of litigation" may "make it difficult for her to remain objective" in the present case. (Trial Trans. p. 73, l. 21—p. 74, l. 3.) As Ms. Clardy stated herself, "[i]t's hard to say" if her sister's lawsuit would effect her opinions in the present case. (Trial Trans. p. 57, ll. 6-9.) The court of appeals upheld the trial court's ruling in a carefully reasoned published decision. *Tinner v. United Ins. Co. of America*, 308 F.3d 697 (7th Cir. 2002).

In oral argument before this Court, counsel for Miller-El pointed to the hypothetical case described in *Hernandez v. New York*, 500 U.S. 352 (1991) in which the evidence of racial discrimination during *voir dire* was so strong that, "a finding of no discrimination is simply too incredible to be accepted." (Transcript of Oral Argument p. 3.) Miller-El's counsel went on to state of *Miller-El v. Cockrell*, "This is truly that exceptional case, and therefore the Court should use it as a model, a model of the weight of evidence sufficient to render objectively unreasonable a trial judge's rejection of a Batson challenge." (Transcript of Oral Argument p. 3, ll. 11-19.)

In contrast, this is *not* that truly exceptional case and there is absolutely no basis upon which to determine the trial court's rejection of Tinner's *Batson* challenge was erroneous. Unlike *Miller-El*, the facts

here are simple and undisputed. The only issue before the Court is United Insurance's peremptory challenge of one African-American juror and the trial court's ruling following a *Batson* hearing held at the time of the peremptory challenge.

Tinner has not pointed to any evidence of discriminatory intent in the statements, conduct, or demeanor of United Insurance's trial counsel during *voir dire*, other than United Insurance's strike of Potential Juror Francis. Contrary to Tinner's assertion, the peremptory challenge of Potential Juror Francis, a Caucasian female, is not evidence of discriminatory intent. This Court has stated that the purpose of the peremptory challenge is to "assure the selection of a qualified *and unbiased* jury" by enabling each party to exclude jurors believed to be more partial to the other side and preventing individuals biased in either direction from being impaneled. *Holland v. Illinois*, 493 U.S. 474, 484 (1990)(quoting *Batson*, 476 U.S. at 91)(emphasis by *Holland* court). Counsel for United Insurance properly struck Ms. Francis because her answers provided evidence of the potential for bias towards the plaintiff; just as Mr. Kuester was presumably stricken by Tinner, because of the potential for bias towards the defense.

C. The Standard of Review Here Differs from that Applicable in *Miller-El*.

This is a direct appeal from an adverse jury verdict in a race discrimination claim brought under Title VII of the Civil Rights Act of 1964, rather than an appeal from a denial of a petition for habeas relief. Thus a different standard of review applies here. The issue in *Miller-El* is whether the Fifth Circuit erred in refusing to issue a certificate of appeal based on the lower court's denial of Miller-El's petition for a writ of habeas corpus.

A certificate of appeal should be issued if "the applicant has made a substantial showing of a denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)(quoting 28 U.S.C. § 2253(c)). An applicant has made a "substantial showing" where the petitioner demonstrates his petition for habeas relief involves issues which are debatable among jurists of reason, that another court could resolve differently, or that the issues are adequate to deserve encouragement to precede further. *Id.* at 484.

Here, the standard of review is simply whether the trial court's determination that United Insurance's peremptory challenge of Prospective Juror Clardy was not discriminatory is "clearly erroneous." *Hernandez*, 500 U.S. at 365. "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). As the Seventh Circuit has stated in applying the "clearly erroneous" standard: "When in response to a Batson challenge the [striking party] gives a race-neutral reason that persuades the judge, there is no basis for reversal on appeal unless the reason given is completely outlandish or there is other evidence which demonstrates falsity." *Morse v. Hanks*, 172 F.3d 983, 985 (7th Cir. 1999)(quoting *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998)).

II.
A CHANGE IN THE *BATSON* STANDARD OF REVIEW IS INAPPROPRIATE AND USE OF THIS COURT'S SUPERVISORY AUTHORITY IS UNNECESSARY.

In oral argument before this Court, counsel for Miller-El conceded that minority jurors could legitimately be stricken for cause as well as through peremptory challenges:

> Mr. Waxman: The prosecution said we had two different ways of questioning about these two subjects, and we used them deliberately at—with different jurors and we did it in order to remove jurors that we thought were weak on the death penalty. That is the reason that they give and that's the reason against which their justification must be judged . . .
>
> Question: You would concede that would be legitimate?
>
> Mr. Waxman: Sure . . .

(Transcript of Oral Argument p. 16.) Miller-El's counsel was not arguing for a new or different standard to be established for evaluating a strike of a minority juror. Instead, he argued that *Miller-El* was an exceptional case and that the trial court did, in fact, err in its application of *Batson* and its progeny. In contrast, Tinner does not argue that his case is exceptional, but that this Court should exercise its supervisory authority over the lower courts to create a new standard under which the criteria used to strike Ms. Clardy would be considered violative of the Equal Protection Clause.

(Petition pp. 9-11.) Such an exercise of this Court's supervisory authority is unnecessary and would be inappropriate.

A. "Clearly Erroneous" is the Proper Standard of Review for a *Batson* Challenge.

A trial court's determination regarding a *Batson* challenge is a purely factual determination. *Batson*, 476 U.S at 98 n. 21. Consequently, a federal appellate court must review a trial court's ruling under Federal Rule of Civil Procedure 52(a) which permits factual findings to be set aside only if clearly erroneous. It is unnecessary for this Court to accept certiorari to change the standard of review on appeal from "clearly erroneous" to "*de novo*" because such an exception to this rule for review of *Batson* challenges would be inappropriate. (Petition pp. 23-24.)

A *de novo* standard of review is appropriate for a trial court's ruling on a motion for summary judgment because summary judgment seeks a judgment as a matter of law. Unlike a *Batson* challenge, all of the facts and evidence available to the trial court are also in the record and available to the appellate court on summary judgment. The trial court's determination on summary judgment does not turn on credibility of witnesses, but rather on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(e). A grant of summary judgment is a final judgment that irrevocably denies a party's right and opportunity to present his or her case to a jury. As such, *de novo*

review of all of the evidence that was before the trial court is appropriate and necessary.

In contrast, a more deferential standard of review is particularly appropriate for a trial judge's factual finding at stage three of the *Batson* analysis because only the trial judge is able to observe the demeanor and credibility of both the prospective jurors and trial counsel during *voir dire*. The credibility of the counsel exercising the challenge is central to the *Batson* inquiry. *Batson*, 476 U.S. at 98, n. 21. "The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984)(internal citations omitted). Thus, a trial judge's ability to witness venire members "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether counsel's reason for striking a particular venire member is credible or pretextual. *Id.* at 1038, n. 14.

A new standard of review is unnecessary to permit appellate courts to review and correct any errors made by the trial court. Even such considerable deference does not prevent appellate courts from stepping in to correct the trial court's determination where discriminatory intent is clear on the face of the record itself, *Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992), or where the trial court has applied an improper standard in its determination. *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998).

B. A Change in the Trial Burden to "Clear and Convincing Evidence" is Unnecessary.

A change in the trial burden of proof on the party exercising the peremptory challenge to "clear and convincing evidence" is similarly inappropriate and unnecessary. (Petition pp. 23-26.) Historically, a clear and convincing evidence standard has been applied "where the claimant either sought extraordinary relief or based his claim on disfavored grounds, or where he sought relief which would have serious social consequences or harsh effects on an individual beyond the mere award of money damages." Comment, 24 EMORY L.J. 105, 114 (1975). Use of a peremptory challenge is not "extraordinary relief" nor is it disfavored. On the contrary, the peremptory challenge at issue here exemplifies the very purpose of the peremptory challenge—to protect each party's right to trial by a neutral and unbiased jury.

C. Importing Title VII Standards for Proving "Pretext" at Stage Three of the *Batson* Inquiry Would Not Change the Analysis or the Outcome Here.

Tinner also suggests importing Title VII standards for the trial court's determination at step three of the *Batson* inquiry. (Petition pp. 17-19.) Petitioner's brief is not entirely clear in how imputing Title VII standards would change step three of the *Batson* analysis.

Under Title VII, once a *prima facie* claim of discrimination has been established and the employee-defendant has articulated a race-neutral reason for the employment decision complained of, the burden of proof shifts back to the plaintiff-employee to

demonstrate that the reason articulated is a pretext for discrimination. *Kulumani v. Blue Cross Blue Shield*, 224 F.3d 681, 684 (7th Cir. 2000). In other words, the employee must demonstrate that the articulated reason is a lie—a fabrication designed to conceal the true unlawful motivation for the decision. *Id.*

While never so clearly defined in the *Batson* context, this is essentially the standard currently being applied in determining whether the proffered reason for a peremptory challenge was made with intent to discriminate at stage three of the *Batson* analysis. As discussed above, considering the totality of the circumstances, the trial court must make a determination as to the credibility of counsel making the strike and whether the proffered explanation is a pretext for unlawful discriminatory intent.

The only distinction between the *McDonnell Douglas* burden shifting mechanism applied in employment discrimination cases and the *Batson* inquiry is that under *McDonnell Douglas*, at the third step the burden of proof shifts back to the plaintiff-employee to demonstrate the proffered reason is pretextual, rather than simply leaving this determination to the finder of fact as in the *Batson* context. This is a difference without distinction that, if anything, may place a heavier burden on the party attempting to prove purposeful discrimination. In either event, there still must be a showing of intent to discriminate.

III.
THE STANDARD FOR APPLICATION OF EQUAL PROTECTION REQUIREMENTS TO PEREMPTORY CHALLENGES IS WELL-SETTLED AND UNIFORMLY APPLIED THROUGHOUT THE CIRCUITS.

This case involves the application of well-settled constitutional principles to relatively simple facts. Thus the Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

A. There Is No Need to Address Alleged Misperceptions Arising From *Purkett*.

The standard for trial courts to apply in determining whether a peremptory challenge is discriminatory was clearly articulated by this Court in *Batson v. Kentucky*, 476 U.S. at 96-98, and has been further clarified by this Court's decisions in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), *Hernandez v. New York*, 500 U.S. at 359-66, and *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995).

In *Purkett*, this Court clarified the standard to be applied at step two of the *Batson* analysis, the stage at which the party exercising the peremptory challenge must articulate a race neutral reason for the strike. At step two of the *Batson* inquiry, "the issue is the facial validity of the [striking party's] explanation. Unless a discriminatory intent is inherent in the [striking party's] explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 768. At this stage, all that is required of the proponent is a "'clear and reasonably specific' explanation of his 'legitimate reason' for exercising the challenge." *Id.* (quoting *Batson*, 476 U.S. at 98.) Any characteristic that is not "peculiar to any

race"–even a "silly or superstitious" explanation—is satisfactory at stage two. *Id.*

Tinner argues that lower courts' "misperception" of this holding has effectively extinguished the right of a litigant making a *Batson* challenge to a non-pretextual reason for the challenge. (Petition p. 3-4, 17, 19-20.) However, *Purkett* is clear in holding that while "silly or superstitious" reasons must be accepted at stage two as long as discrimination is not inherent in the reason, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" by the trial court at stage three. *Id.* At stage three of the inquiry, the trial court must consider "all relevant circumstances" including a pattern of strikes against black jurors, *Batson*, 476 U.S. at 97, whether the rationale for the strike was applied consistently to all similarly situated members of the venire, *Coulter*, 155 F.3d at 921, the truth of the proffered explanation, *Splunge*, 960 F.2d at 708, disparate questioning of jurors, and the demeanor and credibility of both the prospective juror and the attorney exercising the challenge. *Hernandez*, 500 U.S. at 365.

B. The Lower Courts Have Uniformly and Properly Applied *Batson*'s "All Relevant Circumstances" Requirement at Step Three of the Analysis.

United States district courts and courts of appeal, with the possible exception of the Fifth Circuit's decision in *Miller-El*, have uniformly applied the standard articulated in *Batson* and its progeny to ensure the equal protection rights of litigants and prospective jurors are protected. Based on this standard, the Seventh Circuit recently rejected a state court's ruling on a *Batson* challenge, holding the court's refusal to

consider statistical evidence of disparities in the state's application of the articulated race-neutral reasons for its use of peremptory challenges was an "unreasonable application" of *Batson*'s "all relevant circumstances" requirement at step three of the analysis. *Henderson v. Walls*, 296 F.3d 541, 550-51 (7th Cir. 2002).

In *Coulter v. Gilmore*, 155 F.3d at 921-22, the Seventh Circuit re-affirmed this principle in holding a state trial court violated *Batson* by utilizing a procedure which prevented him from considering the "totality of the circumstances" at step three of the *Batson* analysis.

In *Splunge v. Clark*, 960 F.2d at 707-08, the state's use of peremptory challenges to exclude a black venire member violated *Batson* where, during *voir dire*, the prosecutor asked the only two black venire members whether their race would cause them to be biased towards the defendant because he is black and asked one of the black venire members if he knew anyone who had been charged with a crime, while he asked the next three white venire members whether they or their friends had ever been the victim of a crime. The prosecutor's articulated reason for the challenge was the juror did not exhibit a good understanding of the standard "beyond a reasonable doubt." *Id.* at 708. The Seventh Circuit properly applied *Batson* and its progeny to reject the challenge as unconstitutional because of the disparate questioning of the prospective jurors, the lack of any evidence in the record that the juror did not understand the standard of proof to be applied in a criminal trial, and the fact that a white juror with an identical answer to questions regarding the standard of proof was not stricken. *Id.* at 708-09.

The Third Circuit applied this principle to overturn the denial of a habeas corpus relief because the

record did not show that the state court had considered all of the relevant evidence at stage three of the *Batson* analysis. *Riley v. Taylor*, 277 F.3d 261, 286-87 (3rd Cir. 2001)(en banc). The court stated that in light of the "perfunctory quality" of the second step of the *Batson* inquiry following *Purkett*, "it is even more important today than ever that the Batson inquiry not omit consideration of the totality of the circumstances, both for itself and as it relates to the evaluation of similarly situated potential jurors . . .." *Id.* at 287.

The Tenth Circuit also recently applied *Batson* to uphold a trial court's denial of a defendant-employer's peremptory challenge of a female venire member in a gender discrimination case. *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002). Defense counsel challenged three female prospective jurors because none of them were currently employed and "would not have that perspective to bring to deliberations." *Id.* at 1215. The trial court assessed the credibility of the proffered explanation based upon all of the relevant circumstances and found the reason pretextual as to one of the prospective jurors who had significant past work experience. *Id. Also see United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992)(prosecutor's reason for peremptory challenge, that juror lived in predominantly low-income black neighborhood and was likely to believe that police "pick on black people," was not an adequate, race-neutral explanation as required by *Batson* because it "reflected and conveyed deeply ingrained and pernicious stereotypes" rather than a link between a specific juror and the facts of the case); *United States v. Wynn*, 20 F.Supp.2d 7 (D. D.C. 1997)(use of facially race-neutral criteria to exclude venire members is a pretext for discrimination where the record reveals the criteria

were applied inconsistently to members of different races).

Lower courts have also properly applied *Batson* and its progeny to determine peremptory challenges of minority jurors do *not* violate equal protection requirements. *See United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002)(trial court did not err in holding prosecution's strike of three black females was not discriminatory where two had relatives in the criminal justice system, the third impressed the prosecutor as a highly opinionated person, and the removal of the jurors still left a majority-female jury that included two African Americans); *Devoil-El v. Groose*, 160 F.3d 1184 (8th Cir. 1998)(trial court did not err in finding a venire member's unemployment, having a relative in jail, dissatisfaction with the police, having been charged with a crime, and having been a crime victim were not racially-motivated reasons for use of a peremptory challenge); *United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002)(trial court did not commit clear error in finding the race-neutral reasons offered by the government were credible where all of the relevant circumstances were considered including the government's motion in limine to exclude evidence that the defendant had been targeted by government officials because of her race and the defendant introduced no evidence to discredit the proffered explanations and establish pretext).

Because this Court's well-settled and clearly articulated standard for use of a peremptory challenge to strike minority jurors has been uniformly and properly applied in the lower courts, no further clarification is necessary.

IV.

THE COURTS BELOW PROPERLY APPLIED *BATSON* JURISPRUDENCE IN DETERMINING THE PEREMPTORY CHALLENGE DID NOT VIOLATE EQUAL PROTECTION REQUIREMENTS.

Unlike the trial judge in *Miller-El*, the trial court in the present case had the benefit of the guidance provided by this Court's decisions in *Hernandez*, *Edmonson*, *J.E.B.* and *Purkett*, when it conducted the *Batson* hearing in this case and made its determination regarding the challenged jury strike. The trial court correctly applied the standards articulated by the Court in these decisions in determining the strike of Ms. Clardy was not made with intent to discriminate, and that determination is entitled to great deference.

A. The Question at Issue is Not a Surrogate for Race.

In his Petition Tinner argues, "[u]nsurprisingly in view of her race, Ms. Clardy answered in the affirmative that she knew someone who had been involved in a prior discrimination suit." (Petition p. 6.) He went on to state, "It is beyond argument that a *voir dire* question directed to a potential juror asking whether she 'knows' or is 'related to' anyone who has filed a discrimination claim is more likely to elicit a positive response from a black venire member than others." (Petition p. 15.) Finally, he asserts that if knowledge of a prior discrimination case and the characterization of it as an 'ordeal' is a race-neutral reason for striking an African-American juror, "no civil rights defendant . . .will ever be [tried before] a broad cross-section of the community, because it will never include an African-American among its number." (Petition p. 22.)

No such claim was raised at the time of the *Batson* hearing during the trial in this matter and Tinner has not presented any statistical evidence to support these assertions since that time. It is absurd to suggest there will never be an African-American venire member who does not know or is not related to someone who has filed a claim of discrimination. Such an argument relies upon the very kind of stereotypical notions Tinner rightly abhors.

When the central issue in a case is discrimination, trial counsel would be remiss in his duty to his client if he did not inquire into prospective jurors experiences or attitudes about that issue in order to obtain unbiased jurors. The very purpose of *voir dire* is to allow each party to question prospective jurors to determine potential biases and thus assure both the reality and appearance of a qualified and unbiased jury. *Holland*, 493 U.S. at 484.

B. Disparate Impact of a Criteria is Not Conclusive Evidence of Intent to Discriminate.

Assuming, *arguendo*, an African-American venire member is *more likely* to answer affirmatively to the question at issue than a non-minority member of a panel, such a correlation does not equate with a surrogate for race.[2] In applying *Batson*, this Court has followed the long-established equal protection principle that disparate impact alone is insufficient to prove discriminatory intent. *Washington v. Davis*, 426 U.S. 229, 242 (1976)(holding a test which was neutral on its

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[2] United Insurance notes that Tinner has provided no statistical evidence of any such correlation. In this case, one white male and one black female responded affirmatively to the same question.

face did not violate equal protection solely because it had a racially disproportionate impact.) This principle was affirmed in the *Batson* context in *Hernandez*, 500 U.S. at 360, and *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). In *Hernandez*, the Court stated "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause." 500 U.S. at 360. Further, "strikes based on characteristics that are disproportionately associated with [any minority] could be appropriate, absent a showing of pretext." *J.E.B.*, 511 U.S. at 143. For this Court to hold, as Tinner seeks, that an affirmative response to the *voir dire* question "Do you know anyone who has filed a discrimination claim?" cannot be a race-neutral reason for a strike because the question may disproportionately affect minority jurors would fly in the face of the well-established constitutional principle that an equal protection violation requires proof of discriminatory *intent*.

The courts below correctly found that Tinner did not establish United Insurance acted with discriminatory intent in exercising a peremptory challenge to strike Prospective Juror Clardy. The trial court heard the entire *voir dire*, conducted a *Batson* hearing immediately after the peremptory challenge was made, evaluated the statements, demeanor and body language of both the prospective juror and trial counsel, and determined there was no intent to discriminate based on race.

C. The Facts Underlying Tinner's Title VII Claim Provide No Justification for this Court's Exercise of Its Certiorari Jurisdiction.

Even if this Court believes further clarification of the standard to be applied in evaluating *Batson* challenges may assist lower courts, this case is not the appropriate vehicle for such clarification. Constitutional principles were properly applied in the selection of the jury before whom Tinner's Title VII claim was tried and the verdict reached by that jury was supported by both fact and law.

Tinner was employed as a Sales Representative in United Insurance's Evansville, Indiana office from March 19, 1990, through June 10, 1996. (ROA, Doc. 32, Ex. A, para. 5.) He was terminated on June 10, 1996, because he failed to appear for work or present a doctor's excuse for his absence. (ROA, Doc. 32, Ex. A, para. 43.) Contrary to Tinner's assertion, there is no evidence in the record that his colleagues "judged him uniformly to be professional, hard-working, and business-like." (Petition p. 3.) Nor is there evidence in the record to support Tinner's assertion that his employer had knowledge he was absent from work due to a "medically-verified back condition." (Petition p. 4.)

On or around May 10, 1996, Tinner requested one week of vacation from June 10, 1996, to June 14, 1996. (ROA, Doc. 32, Ex. A, para. 27.) His supervisor denied the request because Tinner had taken a week of vacation less than one month earlier and because he was not meeting the expected sales increase for his debit route. (ROA, Doc. 32, Ex. A, paras. 30-33.) On Monday, June 3, 1996, Tinner called in sick. (ROA, Doc. 32, Ex. A, para. 34.) He did not present a doctor's

excuse or contact his staff manager or district manager as required by Company policy. (ROA, Doc. 32, Ex. A, paras. 35-36.) Tinner was absent the entire week of June 3, 1996. (ROA, Doc. 32, Ex. A, para. 37.)

On June 6, his staff manager informed him he must report to work on Monday, June 10, 1996, or have a doctor's note excusing him from work, or it would be assumed he wished to terminate his employment with United Insurance. (ROA, Doc. 32, Ex. A, para. 39-40.) On June 10, Tinner went to the United Insurance office and gave the office administrator a note stating his last day of work would be June 21, 1996, and a "Certificate to Return to Work" signed by his doctor stating Tinner was able to return to work on June 10, 1996. (ROA, Doc. 32, Ex. A, paras. 41-42.) Despite being released to return to work on June 10, Tinner did not return to work. (ROA, Doc. 32, Ex. A, para. 42.) In a letter dated June 11, 1996, his staff manager informed him his employment with United Insurance ended as of June 10, 1996, due to his failure to appear for work. (ROA, Doc. 32, Ex. A, para. 43.)

Tinner filed suit against United Insurance alleging race discrimination. (ROA, Doc. 1.) At trial he argued that his former employer discriminated against him on the basis of his race in wrongfully terminating his employment ten days prior to the date he intended to quit.

Tinner implies that United Insurance's strike of Ms. Clardy prevented him from obtaining a fair trial in part because "conflicting testimony [of witnesses] broke down along racial lines." (Petition pp. 7-9.) Yet ample evidence was produced at trial for the jury to find the testimony of certain witnesses called by Tinner less credible than certain defense witnesses. For example,

Clarence James, William Taylor, and Scott Wright were seated at the same table in a restaurant when two of these individuals claimed they overheard a conversation at another table. William Taylor, called as a witness by Tinner, testified he was seated at the table right next to Tinner's staff manager, such that he could not back up his chair to get out of his seat without bumping someone at her table, when he allegedly overheard her make a racially derogatory remark towards Tinner. (Trial Trans. p. 162, ll. 7-16.) Clarence James, also called by Tinner, testified that there was one table between where they and Tinner's staff manager were seated. (Trial Trans. p. 133, ll. 1-2.) These statements, among others, could not be reconciled and cast doubt on the credibility of Tinner's witnesses.

Evidence was also presented at trial that Tinner was seeking employment elsewhere during the period he was off work claiming to be sick. (Trial Trans. pp. 486-88.) On May 30, 1996, Tinner filled out an application for employment at American General Financial Group. (Trial Trans. p. 487-88.) On June 1, 1996, he signed a "notification of appointment" and contract for employment with American General Finance Group. (Trial Trans. p. 488.)

The jury who judged Tinner's case was selected properly and without discrimination violative of the Equal Protection Clause or this Court's *Batson* jurisprudence. The jury's determination that United Insurance did not discriminate against Tinner in terminating his employment ten days prior to the date he intended to quit was supported by the facts and law. No egregious error occurred which deserves this Court's attention to correct.

CONCLUSION

The questions presented in Tinner's Petition are not worthy of a Writ of Certiorari because the proper standard for use of a peremptory challenge to strike a minority juror is well-settled, uniformly applied throughout the circuits, and a change in the standard of review would be inappropriate. The courts below properly applied this Court's *Batson* jurisprudence in finding the challenge did not violate the Equal Protection Clause and there is no egregious wrong this Court must address through exercise of its certiorari jurisdiction. For all of the foregoing reasons, United Insurance Company of America, by counsel, respectfully requests that Tinner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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